



OCTOBER 15, 2008

## ADVISORY OPINION 08-08

Interpretation of T.C.A. §§ 3-6-305(b)(2),(b)(4) and (b)(7) with respect to whether State Officials may attend a conference partially funded by employers of lobbyists, and accept free materials and promotional items provided by the employers of lobbyists in connection with the conference.

### **INTRODUCTION**

The following Advisory Opinion (“Opinion”) is in response to a written inquiry from Mr. Leonard Oliver of the Tennessee Department of Transportation’s (“TDOT”) Geotechnical Engineering Section.

### **QUESTIONS**

1. Does the Tennessee Comprehensive Governmental Ethics Reform Act of 2006 (“Act”) prohibit state officials (“Officials”)<sup>1</sup> from accepting<sup>2</sup> benefits provided by employers of lobbyists (“Employers”) in connection with a conference sponsored by an established and recognized umbrella organization for Officials?
2. Does the Act prohibit Officials from attending the working sessions of such a conference if Employers<sup>3</sup> partially pay for the physical facilities in which these working sessions are held?

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<sup>1</sup> An “official in the executive branch” means “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.” Tenn. Code Ann. § 3-6-301(19). An “official in the legislative branch” means “any member, member-elect, any staff person or employee of the general assembly or any member of a commission established by and responsible to the general assembly or either house of the general assembly who takes legislative action. ‘Official in the legislative branch’ also includes the secretary of state, treasurer, and any employee of those offices.” Tenn. Code Ann. § 3-6-301(20). Throughout the remainder of this Advisory Opinion, the term “Official(s)” will be deemed a reference to state officials as defined by Tenn. Code Ann. § 3-6-301(19) and (20).

<sup>2</sup> As Mr. Len Oliver is an Official and asks his questions on behalf of Officials, answers will focus on whether Officials may accept the certain benefits described in his request. It is important to note that the Act prohibits Employers from providing, as well as officials from receiving, “gifts” as defined by the Act.

<sup>3</sup> All persons contributing to the Conference in this fashion may not be Employers. With small exception, the Act regulates only gift-giving between non-Employers and Officials. For this reason, this Opinion addresses only the conduct which might fall within the Act’s prohibitions, or the giving of gifts by Employers to Officials.

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3. Does the Act prohibit Officials from taking free materials, product samples, and promotional items provided by Employers<sup>4</sup> at conference vendor booths?

**ANSWERS**

1. No. The Act does not prohibit Officials from accepting entertainment, food, refreshments, meals, beverages, amenities, health screenings, lodging, or admission tickets provided in connection with the conference, so long as the conference is sponsored by an established and recognized umbrella organization for elected or appointed state government officials, and these items are arranged or coordinated through the employees or designated agents of the conference. The Act does not prohibit Officials from receiving informational materials such as books, written materials, and other forms of communication from Employers regardless of whether these items are provided in connection with the conference.

2. No. The Act does not prohibit Officials from attending working sessions at such conferences even if Employers partially fund the physical facilities in which the working sessions are held.

3. No. The Act does not prohibit Officials from accepting free samples and promotional items from Employer vendor booths at such a conference so long as the samples and promotional items are routinely provided by the Employer to customers, suppliers, and potential customers and suppliers in the ordinary course of the Employer's business.

**FACTS**

Mr. Leonard Oliver of the Tennessee Department of Transportation's ("TDOT") Geotechnical Engineering Section asks the Tennessee Ethics Commission ("Commission") whether the Act prohibits Officials from accepting benefits<sup>5</sup> funded in whole or in part by Employers in connection with the upcoming fortieth (40<sup>th</sup>) annual Southeastern Transportation Geotechnical Engineering Conference ("Annual Conference"). This funding assistance would take the form of the payment of fees paid to set up vendor booths and the payment of fees to sponsor events, such as breakfasts.<sup>6</sup> Officials will have the opportunity to partake in all conference activities, including the sponsored events.

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<sup>4</sup> All vendor booth operators may not be Employers. With small exception, the Act regulates only gift-giving between non-Employers and Officials. For this reason, this Opinion addresses only the conduct which might fall within the Act's prohibitions, or the giving of gifts by Employers to Officials.

<sup>5</sup> The Commission does not have jurisdiction to address the question of whether the Southeastern Transportation Geotechnical Engineers ("Geotechnical Engineers"), as an organization, may accept monies from Employers. Tenn. Code Ann. § 3-6-301. As the Geotechnical Engineers are a multi-state body comprised of state and federal employees, the Commission is not the Geotechnical Engineers' regulatory body. The Commission does, however, regulate the conduct of Officials who attend the Annual Conference.

<sup>6</sup> In his initial request, Mr. Oliver also asked whether an Employer might act as banker for the Annual Conference. Mr. Oliver has since withdrawn this portion of his request. The Geotechnical Engineers decided the American Institute of Professional Geologists, a non-profit, professional organization which does not employ lobbyists, should act as banker.

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The attendees at the Annual Conference are engineers and geologists employed by federal and state governments around the Southeast who are involved in geotechnical engineering as it relates to transportation (“Geotechnical Engineers”).<sup>7</sup> The Annual Conference is organized and managed by a group of Geotechnical Engineers, whose sole function is to promote, plan, and hold the Annual Conference. The organizers are engineers and geologists employed by state or federal governments and involved in geotechnical engineering as it relates to transportation.<sup>8</sup> Each year, the Annual Conference is held in a different state, and a Geotechnical Engineer from that state acts as Chair.<sup>9</sup> In 2008, the Tennessee members will host the Annual Conference, which will be held in Pigeon Forge, Tennessee.

The Geotechnical Engineers who plan the Annual Conference have complete organizational and decision-making control over the events of the Annual Conference. The Annual Conference is funded by registration and vendor fees, as well as the payment of sponsorships.

Each state and federal employee, or the governmental entity which employs him or her pays a registration fee for that person to attend.<sup>10</sup> Private firms pay fees for the privilege of setting up advertising and information booths in part of the space rented for the Annual Conference. Private firms also pay sponsorship fees for the privilege of sponsoring certain events at the Annual Conference, including breakfasts, lunches, dinners, breaks, and socials. The sponsor’s name appears on a sign board at the sponsored event as well as in the agenda. Payment of a vendor or sponsorship fee does not otherwise allow the payor any control over the sponsored event.

Unless prohibited by the Act, the Geotechnical Engineers anticipate that Officials who attend the Annual Conference will, like other attendees, be able to obtain various items provided by Employers at no cost. Thus, Officials who attend a sponsored meal will receive the food without charge. Further, attendees will be able to obtain free materials, product samples, and promotional items at the vendor booths.

Thus the question is whether the Act would prohibit Officials who attend the Annual Conference from receiving items or benefits provided through the contributions of Employers.

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<sup>7</sup> Cf. <http://www.tdot.state.tn.us/stgec08/about.htm>, discussing the history of the Geotechnical Engineers and <http://www.tdot.state.tn.us/stgec08/program.htm>, setting forth the program for the Annual Conference.

<sup>8</sup> After submitting his formal request, Mr. Oliver spoke with Commission staff. During that conversation, Mr. Oliver stated the Geotechnical Engineers recently decided to allow geotechnical engineers working for private contractors to register for the Annual Conference. This decision was due to state governments’ increasing use of private contractors in the field of geotechnical engineering. Mr. Oliver stressed that these individuals have no control or decision-making authority over the Annual Conference. They are not therefore included in the defined term “Geotechnical Engineers.”

<sup>9</sup> According to Mr. Oliver and the by-laws of the Annual Conference.

<sup>10</sup> Mr. Oliver advises that the State of Tennessee has typically paid the Annual Conference registration fee for Officials. The registration fee does not include lodging. Each conference attendee is thus responsible for his or her own lodging.

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**ANALYSIS**

TDOT is located within the executive branch. As such, TDOT employees are Officials and subject to the Act's prohibitions. Generally, Officials may not accept gifts from Employers.<sup>11</sup>

Tenn. Code Ann. § 3-6-301(11) defines "gift" as "payment, honorarium, subscription, loan, advance, forbearance, rendering or deposit of money or services, unless consideration of equal or greater value is received." The things of value received in connection with the Annual Meeting fall within the definition of "gift." As such, the Officials could not attend and receive the benefits provided by Employers.

**1. Entertainment, Food, Refreshments, Meals, Beverages, Amenities, Health Screenings, Lodging, or Admission Tickets Provided in Connection with a Conference**

Tenn. Code Ann. § 3-6-305(b)(7)(B) states the following items are not subject to the gift ban:

Entertainment, food, refreshments, meals, beverages, amenities, health screenings, lodging, or admission tickets that are provided in connection with, and are arranged or coordinated through the employees or designated agents of, a conference, if the conference is sponsored by an established and recognized organization of elected or appointed state government officials, staff of state government officials or both officials and staff, or any other established and recognized organization that is an umbrella organization for such officials, staff, or both officials and staff.

The Geotechnical Engineers have held an Annual Conference for forty (40) years and they have official bylaws.<sup>12</sup> Further, the Geotechnical Engineers are recognized by the transportation departments of the federal government,<sup>13</sup> Tennessee,<sup>14</sup> and many other states.<sup>15</sup> The Geotechnical Engineers are an organization for state and federal government officials, specifically engineers and geologists.<sup>16</sup> The Geotechnical Engineers are thus an established and

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<sup>11</sup> Tenn. Code Ann. §§ 3-6-304(h)(Employers prohibited from providing lodging to executive branch officials, among others); 3-6-305(a)(2)(Officials in the executive branch, among others, prohibited from accepting gifts from lobbyists or Employers).

<sup>12</sup> <http://www.fhwa.dot.gov/engineering/geotech/conferences/se.cfm> (last viewed July 28, 2008). Mr. Oliver confirmed the existence of bylaws via telephone.

<sup>13</sup> <http://www.fhwa.dot.gov/engineering/geotech/conferences/se.cfm> (last viewed July 28, 2008).

<sup>14</sup> <http://www.tdot.state.tn.us/stgec08/about.htm> (last viewed July 28, 2008).

<sup>15</sup> <http://www.fhwa.dot.gov/engineering/geotech/conferences/se.cfm> (last viewed July 28, 2008).

<sup>16</sup> This information was gleaned from telephone conversation with Mr. Oliver.

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recognized organization and their Annual Conference would meet Tenn. Code Ann. § 3-6-305(b)(7)(B)'s requirements.

In his request, Mr. Oliver uses the term "sponsorship fees" to describe the Employer funding of breakfasts and other events. If the events are in fact "sponsored" by the Employer rather than by the organization, the exception provided by Tenn. Code Ann. § 3-6-305(b)(7)(B) would not apply. Thus it is important to determine whether "sponsorship" as used in the request is the same as the "sponsorship" requirement set forth in the statute.

"Sponsor" is not defined by the Act. Statutory construction normally begins with analysis of the natural and ordinary meaning of the statutory language.<sup>17</sup> Two sources consulted gave much the same definition of the word sponsor. Webster's II New College Dictionary defines "sponsor" as, "one who assumes responsibility for a person or group during instruction, apprenticeship, or probation."<sup>18</sup> Similarly, onlinedictionary.com define "sponsor" as "to assume responsibility for or leadership of;" as in "[t]he senator announced that he would sponsor the health care plan."<sup>19</sup>

Despite their payment of vendor and sponsorship fees, the Employers have no responsibility or control over the activities of the Annual Conference. The Employers simply fund the various items and receive acknowledgement as described above. The organization of the Geotechnical Engineers, under the leadership of the chair and steering, has responsibility for determining the agenda for the meeting, including all activities, presentations, and instruction. The Annual Conference is thus sponsored by the Geotechnical Engineers and not by Employers. The Annual Conference fits the exception provided by subsection (b)(7)(B). Thus the Act does not prohibit Officials from accepting any food, refreshments, meals, beverages, amenities, and admission tickets provided in connection with and arranged or coordinated through the designated agents of the Geotechnical Engineers.

## 2. Employer Funding of Space for Working Sessions

The request assumes that Employers not only sponsor specific events, but also pay fees to set up vendor booths. These fees not only cover the cost of the vendor areas used by Employers to operate their booths, but in effect help to pay for the areas used for the "technical" or working part of the program.<sup>20</sup> There is no specific exclusion in subsection (b)(7)(B) for Employer funding of physical facilities. However, this subsection must be considered in pari materia with the portion of the act which defines "gift."<sup>21</sup> That definition specifically provides that "gift" does

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<sup>17</sup> *State v. Blackstock*, 19 S.W.3d 200, 210 (Tenn. 2000) ("The legislative intent and purpose are to be ascertained primarily from the natural and ordinary meaning of the statutory language.").

<sup>18</sup> *Webster's II New College Dictionary*, 1093 (3<sup>rd</sup> ed. 2005).

<sup>19</sup> [www.onlinedictionary.com](http://www.onlinedictionary.com) (last visited April 15, 2008).

<sup>20</sup> These fees also fund the Annual Conference, generally, but as this opinion has previously addressed the question of Employers' partial funding of the Annual Conference, generally, the Commission now turns to the question of the space for working sessions.

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not include “the waiver of a registration fee for a conference or educational seminar.”<sup>22</sup> While a registration fee may or may not include lodgings,<sup>23</sup> at a minimum it includes attendance at the working sessions of such a conference or educational seminar.

Presumably an Employer could pay the registration fee for an Official to attend a conference or educational seminar, and the Official could receive the benefit of extensive working sessions held in space paid for by the Employer, so long as the conference or educational seminar was legitimate. It would be unreasonable to infer that the Act prohibits an Employer from providing exactly the same thing by means other than waiver of a registration fee. Courts, and the Commission, must construe statutes “with the saving grace of common sense.”<sup>24</sup> The Commission presumes the legislature did not intend to permit an Official to attend a conference which meets the requirements of (b)(7)(B), and accept Employer-provided food, refreshments, meals, beverages, amenities, and admission tickets at that conference, but require the Official to receive all of these items out-of-doors.<sup>25</sup>

Construction of subsection (b)(7)(B) in pari materia with subsection (b)(2) leads to the same conclusion. Tenn. Code Ann. § 3-6-305(b)(2) provides, “[i]nformational materials in the form of books, articles, periodicals, other written materials, audiotapes, videotapes, or other forms of communication,” are not subject to the gift ban. Thus, an Official can accept the informational items above from an Employer at any time, including during a conference.

Speeches, presentations, panel discussions and like forms of communication typically included in conferences and educational seminars are necessarily included in Tenn. Code Ann. § 3-6-305(b)(2)’s exception for “other forms of communication.” It would be absurd to allow an official to accept employer-provided videotapes, books, or audiotapes of a presentation containing informational material but prohibit the Official from attending the live presentation.<sup>26</sup> Thus the Act does not prohibit Officials from participating in any conference activities taking place in space that is paid for in part by an Employer.

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<sup>21</sup> Statutes *in pari materia*, in other words, statutes “relating to the same subject or having a common purpose,” should be construed together, and the construction of one may be used to help resolve ambiguity in another. *Lyons v. Rasar*, 872 S.W.2d 895, 897 (Tenn. 1994).

<sup>22</sup> Tenn. Code Ann. § 3-6-301(11).

<sup>23</sup> According to Mr. Oliver, payment of the registration fee for the Annual Conference does not secure lodging, which will be paid by the state government for Officials. In addition, the registration fee for Officials will be paid for by state government. The registration fees, themselves, do not cover the entire cost of the space needed for the working sessions. The hotel simply looks at the total revenue stream generated by the lodgings and the vendor fees in determining what space to provide for registration, working sessions, meals, and other functions.

<sup>24</sup> *State ex rel. Maner v. Leech*, 588 S.W.2d 534, 540 (Tenn. 1979)(citations omitted).

<sup>25</sup> See Advisory Opinion 08-01 (If an Employer can provide wine in connection with an in-state, all-legislative event, he must necessarily be able to provide a vessel in which to transport the wine, as wine is a liquid).

<sup>26</sup> *Wachovia Bank of North Carolina, N.A. v. Johnson*, 26 S.W.3d 621, 624 (Tenn. Ct. App. 2000)(Courts should presume the legislature did not intend an absurd result).

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**3. Promotional Items Provided by Employers and Vendors at the Conference**

The Act does not prohibit Officials from participating in the Pigeon Forge meeting functions because a recognized and established umbrella organization for state government officials retains sponsorship. The question then becomes whether Officials may accept free materials and product samples provided by Employers to all persons who visit the vendor booths located adjacent to the space in which the conference is held.<sup>27</sup>

Tenn. Code Ann. § 3-6-305(b)(4) provides the following are not subject to the gift ban:

Sample merchandise, promotional items, and appreciation tokens, if such merchandise, items and tokens are routinely given to customers, suppliers or potential customers or suppliers in the ordinary course of business.

As long as the items and tokens given to Officials are in fact routinely given to the Employer's customers in the ordinary course of business, the Act does not prohibit Officials from accepting them.

Dianne Ferrell Neal, Acting Chair

R. Larry Brown

Thomas J. Garland

Linda Whitlow Knight, Esq.

Benjamin S. Purser, Jr.,  
Commissioners

Adopted: March 25, 2008

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<sup>27</sup> Again, the Commission cannot comment on the propriety of the Conference allowing vendors to set up the booths. The Commission can comment only on whether Officials may take the free items from Employers who set up booths.

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**CONCURRING OPINION**

I concur that corporate contributions by Employers, the rental of exhibit space to Employers, and the dissemination of informational materials by Employers are permissible under the Act – or, perhaps better stated, are not prohibited by the Act.

I am writing a separate opinion because, although I agree with the outcome of the Advisory Opinion adopted by the majority of the Commission at the recommendation of the Commission's staff, I respectfully disagree with the rationale.

In approaching this Advisory Opinion, I have spoken with a professional event planner and with the Executive Director of an organization that holds a major conference each year. I have also spoken with Mr. Len Oliver, who submitted the request for this Advisory Opinion, in order to clarify how the revenues and disbursements for the Conference are handled and accounted for. The information from these sources was consistent with my experience in planning and paying for conferences and other sorts of events.

**A. Facts**

The facts as stated in the main Opinion need to be amplified.

It has been established that professional geotechnical engineers who are employed by states including Tennessee and by the U. S. Government have held a Conference each year for the past forty years. A different state hosts the Conference each year, on a rotating basis. Someone from the host state is in charge of the Conference (the "Chair"), with a steering committee of a representative from each of the participating states. In 2008, the Conference was held in Tennessee, and Mr. Oliver was the Chair.

The information that Mr. Oliver originally provided to us included information about the financial arrangements for the Conference. In that information, and in my subsequent conversation with Mr. Oliver, certain facts are apparent.

1. If moneys are left over from one year's Conference, they are passed on to the state holding the next year's Conference. Approximately \$30,000.00 was passed on to Tennessee as accumulated funds for this year's Conference. Each year, the bank account is zeroed out and closed after the balance has been paid to the following year's host state.

2. The revenues for the Conference are from these sources: (A) The moneys brought forward from the prior Conference; (B) the registration fees paid by or for the attendees and guests; (C) the fees paid by vendors which rent exhibition booths for displays and materials; and (D) the corporate contributions that are denominated "sponsorships."

3. All revenues from all of these sources are deposited into a single bank account. A third-party entity opens the bank account and makes the deposits and disbursements. Thus, the bank account is commingled, and no funds are identifiable. This includes the fact that whatever moneys are paid by Employers are indistinguishable from all other funds. All disbursements, for all costs and expenses of whatever kind, are paid out of this single bank account.

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4. The registration fees are usually paid by the attending engineers' employers, i.e., the governments of the represented states and the U. S. government. Presumably, this includes the registration fees paid by the Tennessee attendees who are Officials under the jurisdiction of the Act. It is my understanding that this includes the State of Tennessee. Thus, the attendees who are Officials do not pay a registration fee to attend the Conference.

5. Thus, the bank account for the Conference consisted of (A) registration fees from Officials and their guests, (B) registration fees from people who are from Tennessee but are not Officials and their guests, including federal engineers and their guests, engineers in private practice, and others; (C) registration fees from people who are from outside of Tennessee; (D) the \$30,000.00 passed on by last year's host state; (E) corporate contributions referred to as "sponsorships" from Employers<sup>28</sup>; (F) corporate contributions referred to as "sponsorships" from entities that are not Employers, including some that do not do business in Tennessee; (G) revenue from Employers that rented exhibit space<sup>29</sup>, and (H) revenue from entities that were not Employers that rented exhibit space.

6. The revenues from all of these sources, fungible, commingled and indistinguishable, were used to pay all of the expenses of holding the Conference. These include everything ranging from the cost of posting information about the Conference on the Internet, the cost of the conference center where all sessions were held; the cost of all food, refreshments, beverages, meals, etc.; the cost of preparing and copying educational materials; the cost of the

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<sup>28</sup> This is only an assumption. In this concurring Opinion, I will assume that some of the corporations that made contributions or rented exhibit space were Employers. Mr. Oliver's request was only in terms of vendors, suppliers and consultants "who have involvement in geotechnical engineering with state DOT's by setting up display booths for the attendees to visit and gain information about the company" and making corporate contributions referred to as "sponsorships." The Act does not regulate the conduct of vendors, suppliers and consultants unless they are lobbyists or Employers. The Commission has no jurisdiction over them, or their interactions with state Officials, if they are only vendors, suppliers and consultants. Those interactions are governed by other statutes and regulations. The majority opinion assumes that some of these vendors, suppliers and consultants are Employers, and that we therefore have the authority to issue an Advisory Opinion. "Having involvement in geotechnical engineering with state DOT's" does not sound like lobbying activity as defined in the Act. Tenn. Code Ann. § 3-6-301(15)(C) excludes from lobbying activity defined as:

"Lobby" does not mean communications by an incumbent or prospective contractor or vendor, or an employee of the contractor or vendor, while engaged in selling or marketing to the state, or any department or agency of the state, by demonstrating or describing goods or services to be provided or by inquiring about specifications, terms, conditions, timing, or similar commercial information. However, the contractor or vendor, or employee of the contractor or vendor, shall be deemed to be a lobbyist, solely for the purposes of § 3-6-305, if actively engaged in selling or marketing to an official in the executive branch or an official in the legislative branch whose duty it is to vote for, let out, overlook, or in any manner to superintend any work or any contract so marketed or sold;

Nothing in Mr. Oliver's request suggests that anyone was "actively engaged in selling or marketing to an Official whose duty is to vote for, let out, overlook, or superintend any work or contract so marketed or sold." Mr. Oliver's request did not mention Employers of lobbyists and did not ask the question as the staff wrote it in the majority opinion. I have been unable to find any supplemental notes substantiating that the Commission staff was ever told that any of the corporate contributors or entities that rented exhibit space were Employers.

<sup>29</sup> Again, Mr. Oliver's question was only in terms of vendors, suppliers and consultants. See footnote 1, *supra*.

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field trip that Mr. Oliver mentioned in his request; and the cost of the exhibit space, furniture, utilities, and other amenities that are in turn rented to exhibitors, etc.

7. Thus, it is impossible to know the source of the particular dollars that were paid to the convention center for meeting space, versus meal space, versus exhibit space; to the provider of the field trip; to the caterers or the hotel for the food, refreshments, beverages, meals, etc.; to the vendor who sold the notebooks, paper and copying services for the registration and educational materials; and so on.

8. The registration fees are the same for everyone (except for early versus late registration).<sup>30</sup> All Conference events are open to everyone. No one receives more opportunities or better treatment than anyone else.

9. The amounts to be charged for registration fees, requested for corporate contributions, and charged to rent exhibit space were set well in advance, before anyone knew how many registrants would be attending, how many breakfasts would be eaten, how many cups of coffee and soft drinks would be drunk, and so on. The projected costs were estimates, and the host and steering committee had to do its best to estimate the cost of each component of the entire Conference.

10. The corporate contributors and those who rented exhibit space did not pay the conference center, the caterers, the office supply store, or any third party. They certainly did not pay or make any arrangements with Officials in their capacity as registrants or attendees. They paid their contributions and the rent for exhibit space so that it could be deposited into the segregated bank account set up for the Conference.

11. The Conference Chair and steering committee decided what it wanted to do about food, beverages, refreshments, meals, etc. Part of that process would be to estimate the cost, assuming certain numbers of attendees, which might or might not be accurate, along with estimating the other expenses that would make up the whole conference cost; and to decide how much revenue it wanted to raise from corporate sponsors.

12. The vendors, suppliers and consultants that rented exhibit space to display and demonstrate their products or services and to make available their informational materials received the space, furniture, utilities, and were charged a fee. The price of the exhibit space, and what was provided, were described on the Conference website. Rental included

. . . a typical 8'x10' Booth Area with table & 2 chairs, electric service with extension cord, linen/skirts, trash can, and up to two (2) Conference Registrations, Monday Evening Ice Breaker, All Receptions, Admission to all Conference Technical Sessions, Breakfast, Coffee Breaks, Lunch, Field Trip, and Wednesday Evening Social Hour and Banquet.<sup>31</sup>

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<sup>30</sup> <http://www.tdot.state.tn.us/stgec08/reg.htm>

<sup>31</sup> <http://www.tdot.state.tn.us/stgec08/vendor.htm>

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By definition, the fee charged was the fair market value of what was provided to them. Why? If a company did not want to pay the fee, it would decline. If it wanted to pay the fee, it would rent the space. The charge for the exhibit space was the same for everyone, Employers or not (except for early versus late registration).<sup>32</sup> The Conference Chair and/or steering committee decided how much revenue it wanted to raise from renting exhibit space, and set the fee accordingly.

**B. Corporate Contributions and Rental of Exhibit Space**

My primary difference with the majority opinion is that I do not believe that the corporate contributions referred to as “sponsorships” are covered by the gift ban, even if they are within the definition of “gift.”<sup>33</sup>

It does not appear that paying the steering committee is a gift to an attendee.

In holding conferences and conventions, it is customary to try to get corporate contributions to make the event better or more attractive to prospective attendees to get them to want to attend, and to help reduce the cost of registration *per se*. What the host did here is consistent with what is customarily done, which is make available a selection of contribution levels. They then “try those on for size” with prospective contributors, offering for each higher contribution level a greater level of credit or exposure to the contributor.

Some event planners might ask corporate contributors for \$50,000.00, \$25,000.00, \$15,000.00 or \$10,000.00, and call it “platinum, gold, silver or bronze” sponsorship levels. Larger contributions would get a more prominent listing in the event program, more tables at the banquet, the privilege of introducing the guest speaker, etc. If a potential contributor is not inclined to contribute at a higher level, it is asked if it will contribute at progressively lower levels. The nomenclature varies with the event.

In this instance, the levels of contributions were geared toward levels of food “events,” breakfasts, lunches or breaks.

All payments for vendor space and contributions are made to the host. All are commingled with all other revenues. It is impossible to conclude that a certain contributor’s dollars benefited an Official and not a non-Official. It is impossible to tell whether a meal eaten by an Official was in fact paid for with a corporate contribution from an Employer, a contribution from a non-Employer, exhibit space rental from an Employer, exhibit space rental from a non-Employer, money brought forward from last year’s Conference, a registration fee paid by or for the Official, or a registration fee paid by someone else. There simply was no correlation.

Therefore, I do not believe it is possible to conclude that an Employer’s contribution was a gift to an Official such that the gift ban would apply and we would have to find an exception under § 3-6-305(b) in order for an Official to receive the food, beverages, refreshments or meals.

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<sup>32</sup> *Id.*

<sup>33</sup> See also Advisory Opinions 07-02, 07-07, 08-03, 08-04, Parts I and II, and 08-06.

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The conclusion that corporate contributions *to the host entity* that help reduce the registration fee are not gifts to the Officials is supported by the exclusion from the definition of “gift” for a waiver of a registration fee to an Official at an event hosted by an Employer. If an Employer itself is hosting or holding a conference and waives the registration fee, which is not a gift, as we found in Advisory Opinion 08-06, then it should not be a gift, and should not violate the salutary public policy underlying the Act and the gift ban, for an Employer to make a payment to the host entity, which helps to reduce the registration fee for the Officials that attend.

This is especially true if it is the State of Tennessee that pays the registration fee for the Officials, and the Officials pay nothing to attend any of the events on the Conference calendar.

I also do not believe that it is possible to conclude that an Employer’s exhibit space rental was a “partial funding of meeting space” that would be a gift to an Official attending the meeting, such that we would have to find an exception under § 3-6-305(b) in order for an Official to be allowed to attend the meeting.

The conclusion that renting exhibit space is not a gift is supported by the Commission’s decision in Advisory Opinion 08-04, Part I, which will shortly be issued, that the Act does not prohibit a similar group, the Association of Government Accountants, from soliciting Employers to purchase services offered by the entity, such as advertising in the AGA newsletter, on the AGA website, at an educational event, or in brochures. We succinctly reason that if the entity sells services to an Employer for fair market value, the payment received from the Employer is not a “gift” under Tenn. Code Ann. § 3-6-301(11), and the gift restrictions of Tenn. Code Ann. § 3-6-305 do not apply.

Renting exhibit space is exactly the same situation. The exhibit space is rented on an arms'-length basis and is not a gift.

The majority opinion concluded that the corporate contributions were gifts but that they are nevertheless permissible under the exception at Tenn. Code Ann. § 3-6-305(b)(7)(B) for

Entertainment, food, refreshments, meals, beverages, amenities, health screenings, lodging, or admission tickets that are provided in connection with, and are arranged or coordinated through the employees or designated agents of, a conference, if the conference is sponsored by an established and recognized organization of elected or appointed state government officials, staff of state government officials or both officials and staff, or any other established and recognized organization that is an umbrella organization for such officials, staff, or both officials and staff.

If the majority is correct that the corporate contributions are gifts within the general gift ban of Tenn. Code Ann. § 3-6-305(a)(1), I believe that the majority opinion should have found that the contributions are also within the exception at § 3-6-305(b)(1) for

Benefits resulting from business, employment, or other outside activities of a candidate or official or the immediate family of a candidate or official, if such

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benefits are customarily provided to others in similar circumstances and are not enhanced due to the status of the candidate or official.

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**C. Informational Items**

The final topic covered in the Advisory Opinion is the distribution of tangible informational items to attendees.<sup>34</sup> Mr. Oliver's request described the purpose of the exhibit booths as follows: "Part of the typical conference has been the participation of vendors/consultants/suppliers who have involvement in geotechnical engineering with state DOT's by setting up display booths for the attendees to visit and gain information about the company."

First, the request does not say anything about attendees being given anything tangible that they can carry away with them. Second, if they are given anything tangible, it is "information about the company."

The majority opinion correctly finds that any tangible items given to attendees are a gift under Tenn. Code Ann. § 3-6-301(11), and that they are within the general gift ban under Tenn. Code Ann. § 3-6-305(a)(1).

It also correctly finds that the informational materials are within the exception to the gift ban at Tenn. Code Ann. § 3-6-305(b)(4), as "[s]ample merchandise, promotional items, and appreciation tokens, if such merchandise, items and tokens are routinely given to customers, suppliers or potential customers or suppliers in the ordinary course of business," if they meet the criteria set forth.

The majority opinion does not find that the informational materials are also within the exception of Tenn. Code Ann. § 3-6-305(b)(2) for "[i]nformational materials in the form of books, articles, periodicals, other written materials, audiotapes, videotapes, or other forms of communication."

If we must choose only one exception to the gift ban, Mr. Oliver's description is much closer to what is described in § 3-6-305(b)(2) than to what is described in § 3-6-305(b)(4). Conceivably, however, if anything tangible was given out, it could have been anything that is described in either subsection. Therefore, the majority opinion is remiss in declining to include the exception in § 3-6-305(b)(2). The result is that the majority opinion is too narrow in describing the kinds of tangible items that a vendor is allowed to distribute to attendees who may be Officials.

Linda Whitlow Knight,  
Commissioner

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<sup>34</sup> Renting the exhibit space is how the vendors, consultants and suppliers make their informational materials available to the attendees, including Officials. It is a cost of doing business, just like printing the materials.