



OCTOBER 23, 2008

ADVISORY OPINION 08-09

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 persons 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. Yes. 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.

FACTS

Information Regarding SoFTEC

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

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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 Part 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 on the federal level. It is not registered as an employer of a lobbyist (“Employer”) within Tennessee.⁵

Mr. Nebergall’s communication with TCUL members is presently limited to attending conferences of the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) and responding to requests by NCCUSL and TCUL members. He would like to expand his activities to include more traditional lobbying activities, such as taking TCUL members out to dinner in order to discuss potential legislation.⁶ Mr. Nebergall’s question is whether engaging in the contemplated conduct would require him to register as a lobbyist.

ANALYSIS

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 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

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. He made clear his contemplated activities would be more like traditional lobbying activities.

commission must be responsible to the General Assembly. Third, the commission must take 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. Duties of members of the TCUL

The stated purpose of the TCUL is “the promotion of uniformity of legislation in the United States.” The TCUL consists of three (3) lawyers appointed by the Governor.⁷

The duties of a TCUL member 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 4.⁸
5. To keep a record of its transactions, and at the session of each General Assembly, make a report of its doings and recommendations.⁹

Mr. Charles Trost, Chair 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 submitted after the meeting.

TCUL members are also members of the NCCUSL and thus attend the annual NCCUSL conferences.¹⁰ The members of the TCUL participate in a nationwide discussion of uniform laws

⁷The Director of Legal Services or the Director’s designee is an associate member. Tenn. Code Ann. § 4-9-101.

⁸ Tenn. Code Ann. § 4-9-102.

⁹ Tenn. Code Ann. § 4-9-103.

¹⁰ <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11> (last visited May 30, 2008).

through their membership in NCCUSL. Together with 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, and they consider and draft uniform laws to be submitted for approval and adoption by the states. In addition, in each state they “seek introduction and enactment of Uniform Acts promulgated by the [NCCUSL] that are appropriate for their State.”¹¹

A short review of the NCCUSL’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”¹² and “advocate[ing] the adoption of uniform and model acts in their home jurisdictions.”¹³ The website page describing the work state Commissioners on Uniform Legislation are expected to perform states: “[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.”¹⁴

D. The TCUL’s Legislative Action

Many TCUL members’ activities would not constitute “legislative action,” others would. Some activities fall somewhere in the middle. For example, it is difficult to determine whether making a report to the General Assembly, as required by the statute, should be viewed as taking “nonministerial official action or nonaction” on that report. On the other hand, the duties of members to “work toward enactment of Conference acts in their home jurisdictions”¹⁵ and “advocate the adoption of uniform and model acts in their home jurisdictions”¹⁶ would constitute “legislative action.” It matters not whether the preliminary discussion and drafting is conducted out of state.

Under Tenn. Code Ann. §§ 4-9-102(4) and 4-9-103, quoted above, the TCUL is also to advise and make recommendations to the Tennessee General Assembly. Those functions must be examined to determine whether they constitute “legislative action.” “Advise” may mean to advocate, to propose, or simply to provide information or notice as in “advise them of their rights.”¹⁷ The presence of the word “advise” does not per se render members of the TCUL

¹¹ <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 NCCUSL’s bylaws).

¹² <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11> (last visited May 30, 2008).

¹³ <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11> (last viewed July 2, 2008).

¹⁴ <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11> (last viewed July 8, 2008).

¹⁵ <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11> (last visited May 30, 2008).

¹⁶ <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11> (last viewed July 2, 2008).

¹⁷ <http://www.merriam-webster.com/dictionary/advise> (last visited July 9, 2008).

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.”¹⁸

The Commission concludes that giving general advice to the general assembly may or may not be “legislative action”¹⁹ as contemplated by the Act. However, the Commission concludes that “recommend[ing] such other or further course of action as shall accomplish the purposes of this chapter”²⁰ does rise to the level of “legislative action.” This is especially true as all TCUL members are also NCCUSL members, and are thus expected to “work toward enactment of Conference acts in their home jurisdictions.”²¹

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. A Legislative Official is not required to spend all of his or her time engaged in legislative action. That a Legislative Official takes legislative action when such action is appropriate is sufficient.

II. Communications with Members of the TCUL as Lobbying

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.”²²

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 the proposed contact between a representative of SoFTEC and a TCUL member would fall within any of the exceptions to that definition.

B. Influencing Legislative Action

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

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

¹⁹ Tenn. Code Ann. § 3-6-301(14).

²⁰ Tenn. Code Ann. § 4-9-102.

²¹ <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11> (last viewed July 2, 2008).

²² Tenn. Code Ann. § 3-6-301(15) and (17).

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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.”²³

“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.

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. Mr. Nebergall’s activities up to this point appear to be limited to responding to such invitations. If Mr. Nebergall or another representative responded to a Commissioner’s request for information, statistics, studies or analyses, or gave testimony at a legislative hearing, the representative of SoFTEC would not be influencing legislative action. Therefore, the representative of SoFTEC would not be engaged in lobbying under Tenn. Code Ann. § 3-6-301(15)(A) and would not have to register as a lobbyist under Tenn. Code Ann. § 3-6-302.

As noted above, Mr. Nebergall’s 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. Mr. Nebergall’s contemplated activity goes beyond the exclusion and must be analyzed separately to determine whether it would constitute lobbying.²⁴

The Commission recognizes that TCUL only advises and recommends the General Assembly to adopt laws which have been developed and thoroughly discussed by the NCCUSL. This limitation of TCUL activities has no bearing on whether Mr. Nebergall’s contemplated activities would constitute lobbying. The Act does not require a lobbyist’s communication to actually influence legislative action. Instead, the lobbyist’s communication must only be “for the purpose of influencing any legislative action.”²⁵

The Commission also notes that according to the Chairman of the TCUL, if Mr. Nebergall were to attempt to persuade a TCUL member to advocate a SoFTEC position with regard to the adoption or amendment of a uniform state law, the TCUL member would decline to

²³ Tenn. Code Ann. § 3-6-101(15)(A).

²⁴ Tenn. Code Ann. § 3-6-101(15)(A).

²⁵ Tenn. Code Ann. § 3-6-101(15)(A).

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do so.²⁶ This fact has no bearing on whether Mr. Nebergall would be communicating with the TCUL “for the purpose of influencing any legislative action or administrative action.”²⁷ 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.

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

Donald J. Hall, Chair
Thomas J. Garland
Dianne Ferrell Neal
Benjamin S. Purser, Jr.,
Commissioners

Adopted: August 26, 2008

Issued: October 23, 2008

²⁶ Mr. Charlie Trost, Chairman of the TCUL, stated to Commissioners that if a SoFTEC representative were to attempt to persuade a TCUL member to advocate a SoFTEC position with regard to the adoption or amendment of a uniform state law, the TCUL member would decline to do so. Under the Act, it is not the TCUL member's response that is at issue. Instead, it is the purpose of SoFTEC's communication.

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.

DISSENTING OPINION

I am writing a separate opinion because, even if members of the TCUL are officials in the legislative branch, I do not agree that Mr. Nebergall would be required to register as a lobbyist at all under the facts before the Commission.

I. INTRODUCTION

First, the majority opinion is based on facts that the Commission's staff assumed, but that do not apply to the actual conduct of the TCUL or its members. The majority opinion states that the Commission has considered the unrefuted facts presented by the Chair of the TCUL, Mr. Charles Trost, both in writing, and orally at a Commission meeting. However, the majority opinion relies on the descriptions of State Commissioners' functions on the website of the National Commission on Uniform State Laws. The majority finds as facts the following:

A short review of the NCCUSL'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" and "advocate[ing] [sic] the adoption of uniform and model acts in their home jurisdictions." The website page describing the work state Commissioners on Uniform Legislation are expected to perform states: "[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."

[Citations omitted.]

This implies that TCUL members actively advocate the adoption of uniform statutes after they have been introduced in the Tennessee Legislature.

Mr. Trost's statements contradict the NCCUSL's website. Mr. Trost's statements, not the NCCUSL's website, should be dispositive as to what members of the TCUL actually do.

According to Mr. Trost's explanation, the way the TCUL handles draft uniform laws issued by the NCCUSL is that the TCUL members find someone who will introduce the draft uniform statute. That person or group (hereinafter, "Interest Group") "takes it from there."

The TCUL neither needs, nor uses, nor would use, outside individuals or groups such as SoFTEC or Mr. Nebergall to participate in the process of notifying Interest Groups or finding someone to introduce the legislation. This is something that the TCUL does automatically, on its own. Mr. Nebergall would play no part in this stage of the process.

The Commission should not base a finding of what the TCUL does upon the NCCUSL's website, when the website is contradicted by the statements that the Chair of the TCUL made directly to the Commission. The correct outcome of the Advisory Opinion depends upon what

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the TCUL actually does, within the context of the precise wording of the Ethics Act. Therefore, in my view, the following conclusion in the majority opinion is incorrect:

On the other hand, the duties of members to “work toward enactment of Conference acts in their home jurisdictions” and “advocate the adoption of uniform and model acts in their home jurisdictions” would constitute “legislative action.” It matters not whether the preliminary discussion and drafting is conducted out of state.

[Citations omitted.]

First, the TCUL does not “work toward enactment of Conference acts in their home jurisdictions.” The TCUL members do not “advocate adoption” in any real sense.

Second, “[l]egislative action” means 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.” Tenn. Code Ann. § 3-6-301(14).

In order to be legislative action, the underlying matter must be “pending or proposed in a committee or in either house.” At the NCCUSL stage, nothing is “pending or proposed” in the Legislature. What the members of the TCUL do at the NCCUSL level is not within the definition of “legislative action” under the Act. I do not agree that participating in the drafting of uniform acts as part of a national organization is “legislative action” under the Tennessee Ethics Act.

II. COMMUNICATIONS FROM THIRD PARTIES AT THE NATIONAL LEVEL

A. Solicited Communications

It appears from Mr. Trost’s statements that the NCCUSL makes a generalized request for information and input about the draft uniform statutes on which it is working. It is not apparent that there is any communication that would be defined as unsolicited input from third parties when the delegates from Tennessee are functioning at the NCCUSL level.

Lobbying is communication for the purpose of influencing legislative action. Tenn. Code Ann. § 3-6-301(15). However, “influencing 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

Tenn. Code Ann. § 3-6-301(13).

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If providing information upon request directly to a legislator or legislative committee in Tennessee regarding an actual pending bill is not “influencing legislative action,” it is inconceivable that providing input in response to the NCCUSL’s generalized request or invitation for input could be “influencing legislative action” within the Tennessee Ethics Act.

I therefore agree with the majority that where the NCCUSL requests or solicits information and input, that is an exception to the coverage of the Act, and Mr. Nebergall would not have to register as a lobbyist in Tennessee in order to provide such input.

B. Unsolicited Communications

However, if TCUL members *did* receive “unsolicited” communications about draft laws at the NCCUSL level, such communications should not be deemed lobbying under the Act.

The NCCUSL drafts legislation at the national level. For a Tennessee delegate to participate in the drafting process at the national level is too preliminary to have anything to do with the Tennessee Legislature or to constitute legislative action. As quoted, “legislative action” only pertains to a matter that is “pending or proposed in a legislative committee or in either house of the general assembly.” At the NCCUSL level, the document does not meet the definition.

Furthermore, I believe that communications to State Commissioners at the NCCUSL should not require a person to register as a lobbyist in Tennessee. Spontaneous or *ad hoc* communications about the pros and cons, issues, problems, etc., concerning draft uniform laws can occur in ways that are impossible to regulate. It is easy to envision that all sorts of people, from all over the country, would talk to a TCUL member about the merits of the drafts. These could include representatives of an industry affected by a draft law, a State Commissioner from another state, a member of a working group, or a staffer. Some are paid to try to affect the final version of a draft uniform law, and in all events, they are intentionally trying to persuade the TCUL member. All such communications would occur at the NCCUSL level, not at the Tennessee level. It does not appear that such communications are within the purview of the Tennessee Ethics Act.

They happen before anything is “pending or proposed” in the Tennessee Legislature.

Participation by TCUL members at the NCCUSL level in drafting uniform statutes which may eventually be adopted by the NCCUSL does not appear to be “legislative action” within the definition at Tenn. Code Ann. § 3-6-301(14). Therefore, an unsolicited communication by a third party such as Mr. Nebergall, at the NCCUSL level, could not be “influencing legislative action.” Mr. Nebergall and others who communicate with TCUL members about how the NCCUSL should draft a uniform statute should not have to register as Tennessee lobbyists.

III. COMMUNICATIONS FROM THIRD PARTIES AT THE STATE LEVEL

The facts that have been provided to the Commission for purposes of the majority opinion do not state whether the enhanced communications that Mr. Nebergall wishes to have

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with the TCUL members would take place at the NCCUSL level, or at the Tennessee level, or both levels. If they would be solely at the NCCUSL level, I do not believe that they would constitute lobbying, for the reasons stated above. In that case, this section of this separate opinion is unnecessary. If Mr. Nebergall wishes to communicate with TCUL members about the passage of draft uniform statutes by the Tennessee Legislature, this section is necessary.

It appears that TCUL members perform, or might perform, four functions at the state level.

A. Submitting A Report

One function that the TCUL does perform at the state level is submitting a formal Report to the Tennessee Legislature. The Report contains a section called “Recommendations.” That section basically contains a bare-bones statement, devoid of any comments or narrative, that the TCUL recommends a list of draft uniform statutes that the NCCUSL has adopted.

For the TCUL to do nothing more than lodge the Report with the Legislature may be within the definition of “legislative action,” although it does not appear that the Legislature takes any action on the Report, *per se*, and the Report is not something that is “pending or proposed.” It is simply filed. Even so, Mr. Trost’s unrefuted statement is that there is not, and would not be, any input from a third party such as Mr. Nebergall in relation to the Report. The TCUL prepares and submits the Report automatically, on its own. It is an internal TCUL function. Nothing that a third party such as Mr. Nebergall could say would affect the Report.

There is no basis for Mr. Nebergall to register as a lobbyist in connection with the Report.

B. Informing Interest Groups

A second function that the TCUL does perform at the state level is informing Interest Groups about the draft uniform statutes that the NCCUSL has adopted, so that they can be introduced in the Legislature.

Contact from outside parties such as Mr. Nebergall is not, and would not be, part of this process. Again, the TCUL does this on its own.

No communication by someone such as Mr. Nebergall does or could take place with the TCUL with respect to this function, and he should not have to register as a lobbyist in connection with this function of the TCUL.

C. Furnishing Information Upon Request to Legislature

The third type of function that the TCUL may, but would not inevitably, perform at the Tennessee level is “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.” Tenn. Code Ann. § 3-6-301(13). A member of the TCUL might be requested to

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provide objective information such as how the NCCUSL arrived at the final draft statute that it adopted, what certain provisions were intended to mean, what issues certain language was intended to resolve, what the language of earlier drafts said, or similar information.

By definition, such activity by TCUL members is not “influencing legislative action,” and it does not appear that providing such information, or giving testimony, would be *taking* legislative action. Therefore, if a third party such as Mr. Nebergall provided background information, studies, statistics, or analyses for the TCUL members’ use in performing that function, he should not have to register as a lobbyist in Tennessee.

D. Advocating, “Working Toward Enactment”

The fourth type of activity that the TCUL might theoretically engage in at the state level would be the kind that the majority opinion describes, based upon the NCCUSL’s website, quoted above – working toward enactment of draft uniform statutes in Tennessee after they have been introduced.

If the TCUL actually did this, it would be performing more the role of “influencing legislative action” than the role of *taking* legislative action. The TCUL would be lobbying those who do take legislative action, *but for* two facts: First, the members of the TCUL do not receive any compensation for communicating with the Tennessee Legislature. They are only reimbursed travel expenses for attending the NCCUSL conferences. Second, “[l]obby’ does not mean communications with officials of the legislative or executive branches by an elected or appointed public official performing the duties of the office held.” Tenn. Code Ann. § 3-6-301(15)(B).

Even though advocacy by TCUL members would not be legislative action and would not be lobbying, it is conceivable that communication from Mr. Nebergall to a TCUL member might be lobbying *if* the TCUL members did advocate or urge the enactment of uniform legislation.

However, that issue is moot, because Mr. Trost stated that the TCUL does not advocate or work toward enactment of the NCCUSL’s draft statutes. Mr. Trost stated that if someone like Mr. Nebergall asked a TCUL member to participate in trying to get legislation passed -- or in helping to kill a bill that Mr. Nebergall opposed -- the TCUL member would “just say no.”

If the TCUL does not do anything to work toward the enactment of draft uniform statutes adopted by the NCCUSL after it is “pending or proposed,” and would refuse to do so if asked, the TCUL does not take legislative action with regard to an advocacy function.

There being no legislative action, Mr. Nebergall would not be “influencing legislative action” by asking a TCUL member to advocate or assist with the passage of draft uniform legislation, or to kill such legislation, and being refused.

It appears to me that, if Mr. X approaches an official in the legislative branch and asks for help passing or killing a bill, and the official says, “I don’t do that,” or “I don’t have anything to do with that,” then there is no prospective legislative action and Mr. X cannot be influencing

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legislative action. The communication cannot serve any purpose. If there would be no legislative action, a communication cannot be for the purpose of influencing legislative action.

I do not believe Mr. Nebergall should have to register as a lobbyist in order to have communications that would be a nullity. There are other ways he can influence legislative action in Tennessee that would entail communications with other entities and individuals, which would clearly require registration as a lobbyist.

Linda Whitlow Knight, Commissioner