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February 2, 2011

**ADVISORY OPINION NO. 2011-02**

Mr. William J. Canary  
President and Chief Executive Officer  
Business Council of Alabama  
2 North Jackson  
Montgomery, Alabama 36104

Executive Branch Lobbying/Individuals  
And Entities Engaging In Sales Activities  
With The Executive, Legislative and  
Judicial Branches Of State Government In  
The Ordinary Course Of Business

Individuals and entities that engage in sales activities with the executive, legislative and judicial branches of state government in the ordinary course of conducting their business are not considered to be lobbying, when such activities are solely related to the sale of goods and services as part of their normal job responsibilities, as set out in Section 36-25-1(20)(b)(5).

Individuals and entities hired by a company seeking a contract for the sale of goods or services with an executive, legislative or judicial branch of state government who were hired solely for the purpose of influencing an official decision by an executive, legislative or judicial agency of state government are considered to be lobbying and must register.

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Individuals and entities who merely respond to a request for proposal are not considered to be lobbying and do not have to register as lobbyists.

Dear Mr. Canary:

The Alabama Ethics Commission is in receipt of your request for an Advisory Opinion of this Commission, and this opinion is issued pursuant to that request.

**QUESTION(S) PRESENTED**

BCA seeks the Commission's guidance on whether the revised definition of "lobbying" – when considered in conjunction with other provisions regarding government sales activities – means that the following areas of activity are "lobbying" activities that trigger the Ethics Act's lobbyist requirements regarding registration, fee payment, training, and reporting, along with other potential restrictions and criminal penalties for the failure to comply with these requirements?

Are individuals and entities that engage in sales activities with the executive, legislative, and judicial branches of state government in the ordinary course of their business responsibilities considered to be "lobbying" when such activities promote or influence the awarding of a state grant or contract?

- a. Is a person who communicates with a public official/employee of state government to sell or promote the kind of products, goods, or services that the person (or the person's employer) ordinarily provides engaged in "lobbying" for Ethics Act purposes?
- b. If a person whose primary job is to sell or promote a kind of products, goods or services on behalf of another person (such as an insurance agent's relationship to an insurance company or a sales representative's relationship to a manufacturer) and who communicates with a public official/employee of state government regarding that kind of products, goods, or services "lobbying" for Ethics Act purposes?

## FACTS AND ANALYSIS

The facts as have been presented to this Commission are as follows:

The Business Council of Alabama (“BCA”) requests that the Ethics Commission provide an Advisory Opinion regarding the application of a recent revision to the Ethics Act’s scope of “lobbying.”

### **Overview of BCA and this Request**

“Founded in 1985, BCA member businesses employ nearly three-quarters of a million Alabamians and work to improve Alabama’s business climate. BCA has long believed that integrity in Alabama’s government can be provided through clear and effective ethics laws. The recent revisions to the Ethics Act are a great step towards promoting integrity in government. In this request, BCA asks the Commission to clarify how new Section 1.5 interacts with existing provisions of the Act and to provide assurance that there are not (what BCA believes would be) unintended consequences for hundreds (if not thousands) of businesses and their employees.

### **Background on the Statutory Provisions Involved**

Prior to these most recent statutory revisions, the Ethics Act defined “lobbying” as any attempt to promote, oppose, or influence legislative or regulatory action. This definition of lobbying did not reference government procurement or sales. In addition, the Ethics Act specifically excludes from the definition of the term “*lobbyist*” a ‘person who appears before a legislative body, a regulatory body, or an executive agency to either sell or purchase goods and services.’ This statutory exception has been in the Ethics Act since at least 1995 and was not revised by the most recent statutory revisions.

BCA seeks this Advisory Opinion because of a new provision in the Ethics Act that supplements the definition of “lobbying” (but does not revise the “lobbyist” exception). Specifically, new Section 1.5 of the Ethics Act provides in pertinent part that lobbying “includes promoting or attempting to influence the awarding of a grant or contract with any department or agency of the executive, legislative, or judicial branch of state government.” BCA’s request seeks guidance on how the revised definition of “lobbying” is to be applied in light of the statutory provisions referenced above.

### **Factual Context in Which BCA is Seeking Commission Guidance**

Many BCA members, in the ordinary course of their business, provide products, goods, and services to state government. Businesses routinely have employees who communicate with

public officials/employees about the kind of products, goods, or services that the employer provides. In addition, some businesses ordinarily use non-employees, such as independent contractors or other third parties, as part of their sales and contracting activities (*e.g.*, insurance agents). These employees and independent contractors are people who sell or promote the products, goods, and services in the ordinary course of their business. They are not hired or engaged solely to promote a contract for a product, good, or service to state government.

Ordinary sales activity often involves a contract, but this does not seem to be the sort of activity that is generally considered to be “lobbying.” In sales, arguably any communications with a public official/employee could promote or influence the awarding of a contract (or some other form of sales or service agreement). This could potentially make all sales or contracting communications or activities “lobbying.” If this broad application were to be adopted, it could potentially subject any person who engages in ordinary sales or contracting activities to the detailed lobbying registration, fee payment, training, and reporting requirements in the Ethics Act.

As discussed above, absent Commission clarification an individual who communicates with a public official/employee of state government in the ordinary course of his or her regular employment for the purpose of selling products, goods, or services could be required to register with the Ethics Commission because he or she is deemed to be “lobbying.” BCA does not believe that the Legislature intended such a broad application in expanding the scope of the term “lobbying,” but Commission guidance is needed for businesses potentially affected by this provision.”

In the December 2010 Special Session of the Alabama Legislature, sweeping changes were made to the existing Ethics Law, including for the first time, the promoting or attempting to influence the award of a grant or contract with any department or agency of the executive, legislative or judicial branch of state government is now considered as lobbying.

Section 36-25-1.5 states in pertinent part:

“Lobbying includes promoting or attempting to influence the awarding of a grant or contract with any department or agency of the executive, legislative, or judicial branch of state government.”

Section 36-25-1(20)(b)(5) excludes from the definition of a lobbyist:

“A person who appears before a legislative body, a regulatory body, or an executive agency to either sell or purchase goods or services.”

While these sections appear to conflict, they can easily be reconciled.

It should be pointed out that this is the second opinion rendered under the revised Ethics Law, and the first opinion offered on the issue of executive branch lobbying. Therefore, it is not intended to be anything more than preliminary guidance and a preliminary interpretation of this very important inclusion to the Alabama Ethics Law.

The distinction is as follows:

Certain individuals are employed by a company (XYZ Corporation) in a sales capacity. Their job responsibilities include making sales calls on potential clients in an attempt to sell products for their employer. This is the exception to the definition of a lobbyist stated in 1(20)(b)(5).

On the other side of the equation is the individual who may or may not lobby as part of his regular employment. However, this individual is hired by XYZ Corporation under a third party contract to make contact with public officials in various agencies in an attempt to influence the awarding of a contract to their client, XYZ Corporation. This individual is not an employee of XYZ Corporation, nor are his or her job responsibilities primarily either selling or purchasing goods and services. They are representing a client and attempting to obtain a benefit for their client. This is what is contemplated by Section 36-25-1.5, and these individuals are lobbying and must so register.

Another scenario exists where an individual employed by a vendor of goods and/or services, such as a district manager/supervisor, etc., who is not considered a line employee, but whose main function is to oversee sales on a larger scale than a line sales person, and whose position and responsibilities will include frequent contact with executive, legislative and/or judicial agencies at the state level, for the purpose of establishing contacts, opening doors for line sales people, etc. This individual, while it must be looked at on a case-by-case, fact-specific basis, in most cases, will be deemed a lobbyist for his or her activities involving the above-mentioned agencies, and will be required to register with the Alabama Ethics Commission as a lobbyist.

In sub-question (b), if an individual is a broker for various items (such as insurance policies) and represents various entities and attempts to sell the best product to an entity, this would be considered executive branch lobbying, and that individual, likewise, would be required to register as a lobbyist.

### CONCLUSION

Individuals and entities that engage in sales activities with the executive, legislative and judicial branches of state government in the ordinary course of conducting their business are not

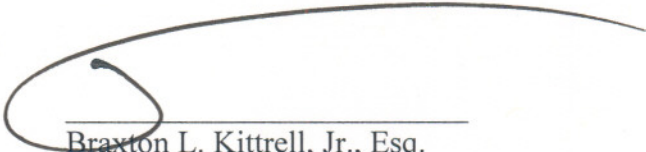
considered to be lobbying, when such activities are solely related to the sale of goods and services as part of their normal job responsibilities, as set out in Section 36-25-1(20)(b)(5).

Individuals and entities hired by a company seeking a contract for the sale of goods or services with an executive, legislative or judicial branch of state government who were hired solely for the purpose of influencing an official decision by an executive, legislative or judicial agency of state government are considered to be lobbying and must register.

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**AUTHORITY**

By 5-0 vote of the Alabama Ethics Commission on February 2, 2011.



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Braxton L. Kittrell, Jr., Esq.  
Chair  
Alabama Ethics Commission