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MAILING ADDRESS
P.O. BOX 4840
MONTGOMERY, AL
36103-4840

STREET ADDRESS
RSA UNION
100 NORTH UNION STREET
SUITE 104
MONTGOMERY, AL 36104

Thomas B. Albritton
Executive Director

TELEPHONE (334) 242-2997
FAX (334) 242-0248
WEB SITE: www.ethics.alabama.gov

October 5, 2016

ADVISORY OPINION NO. 2016-32

The Honorable Trip Pittman
State Senator, 32nd District
P.O. Box 1812
Daphne, Alabama 36526

Conflict Of Interests/Member Of Alabama Senate Supporting, Sponsoring Or Voting On Legislation Dealing With State And/Or Local Revenue Derived From The Sale Of Petroleum Products

A legislator may sponsor, vote on and encourage his legislative colleagues to pass legislation that would increase the tax on gasoline, diesel fuel or other petroleum products because it would affect a large class (every purchaser of petroleum products in the State of Alabama) and would not uniquely affect the legislator, his family or a business with which he is associated.

Senator Pittman should reassess whether he, his family, or a business with which he is associated are uniquely affected by the legislation as it progresses through the Legislature. Any revision which changes the size of the class affected from a large class to a small class of people of which he is a member, or other modifications which cause either him, his family or his business to be affected differently than other members of the affected class would create a conflict of interest for him.

Legislators are reminded, as well, that if a conflict of interest exists, legislative rules outside the Ethics Act require disclosure of that fact to their legislative colleagues through the filing of a report with the Clerk of the House or the Secretary of the Senate for inclusion in the Journal with the proceedings of the Session.

Dear Senator Pittman:

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

QUESTION PRESENTED

May a member of the Alabama Senate, who is the majority stockholder and President of a construction equipment company, support, sponsor or vote on legislation dealing with State and/or local revenue derived from the sale of petroleum products?

FACTS AND ANALYSIS

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

Trip Pittman is a member of the Alabama Senate, representing District 32. By virtue of being elected to the Alabama Senate, Senator Pittman is a “public official” subject to the Alabama Ethics Law. Ala. Code § 36-25-1(27). He is also the majority stockholder and President of Pittman Tractor Company. Pittman Tractor Company leases and sells construction equipment used by the construction industry, and his business operates throughout Alabama. His question is whether he can sponsor, vote on, and encourage his legislative colleagues to pass legislation that would increase the tax on gasoline, diesel fuel or other petroleum products (in other words, a “gas tax”). He states that his support for revenue from a gas tax is based on its being a user fee as well as the need for revenue to improve and enhance infrastructure throughout the State. He states there are numerous transportation safety issues throughout Alabama, two of which are high volume two-lane roads and deteriorating bridges that would benefit from increased revenue generated from an increased gas tax. Infrastructure improvements are one of the stated purposes of the gas tax.

Construction projects for infrastructure improvements will also create jobs and support economic development throughout the state. Given the nature of Senator Pittman's business, more construction projects in his district or elsewhere could, in theory, increase the business for his company.

Under the premise that the Alabama Legislature consists of citizen lawmakers who serve in the Legislature part-time and routinely hold outside employment, questions of this nature arise frequently. The analysis of this issue has been settled since 1985.

Ala. Code § 36-25-5(a) states, "No public official or public employee shall use or cause to be used his or her official position or office to obtain personal gain for himself or herself, or family member of the public employee or family member of the public official, or any business with which the person is associated unless the use and gain are otherwise specifically authorized by law." Under Section 5(b), a legislator "may not vote for any legislation in which he or she knows or should have known that he or she has a conflict of interest."

The Code defines "conflict of interest" as: "A conflict on the part of a public official or public employee between his or her private interests and the official responsibilities inherent in an office of public trust. A conflict of interest involves any action, inaction, or decision by a public official or public employee in the discharge of his or her official duties, which would materially affect his or her financial interests, or those of his or her family members, or any business with which the person is associated **in a manner different from the manner it affects the other members of the class to which he or she belongs.**" (Emphasis added.) Ala. Code § 36-25-1(8) (Emphasis added). Moreover, Ala. Code § 36-25-5(f) recognizes a *per se* conflict of interest for legislators when a business with which an official is associated, (owns, has control over or the exercise of power over any interest greater than five percent of the value of the corporation) or a "business entity of any kind" for whom the official is an officer or director is "**uniquely affected** by proposed or pending legislation." (Emphasis added.)

In two separate Opinions of the Justices, the Alabama Supreme Court recognized that "the wheels of government would stop" if legislators were not allowed to vote on matters in which they have a remote financial interest. Both Opinions reaffirm the requirement that for a conflict of interest to exist, the proposed legislation must "uniquely affect" the legislator, his or her family, or businesses with which they are associated. See Opinion of the Justices No. 317, 474 So. 2d 700 (Ala. 1985); Opinion of the Justices No. 368, 716 So. 2d 1149 (Ala. 1998). The Supreme Court clarified Section 5(a)'s prohibitions by stating that it applied to voting on "an interest affecting the legislator individually or as a member of a small group." Lambert v. Wilcox County Comm'n, 623 So. 2d 727 (Ala. 1993).

Recently, the Commission, in Advisory Opinion No. 2016-05, further clarified the conflict of interest issue in the context of legislation drafted or endorsed by a legislator's employer by saying, "The legislator must first ask whether he or she is employed by the organization that drafted the legislation, or whether it was drafted by a 'business with which they are associated' or which has the authority to hire or fire the legislator. If the answer to any of these questions is 'yes,' then the legislator can have no part in sponsoring, encouraging others to support the legislation, or voting for it."

The Commission went on to say, "If the legislation is on an issue affecting a large class, not drafted by the legislator's employer and neither the passage nor the defeat of the measure will uniquely affect the legislator, or his or her employer, family or business with which they are associated, then even if the measure is supported or opposed by his or her employer, as we have traditionally recognized the legislator may sponsor or vote on the legislation."

The legislation Senator Pittman refers to would increase the taxes paid by every Alabama citizen or business who purchases petroleum products. The ultimate beneficiary of tax increases is the State itself. Therefore, the proposed legislation would not uniquely affect either Senator Pittman, his family, or his business. Any increased economic activity which the tax may generate for anyone is speculative at this point; but if Senator Pittman's business increased as a result of the tax revenue, the tax, likewise, would increase the opportunity for projects for every business like his throughout the state, including those of his competitors.

CONCLUSION

A legislator may sponsor, vote on and encourage his legislative colleagues to pass legislation that would increase the tax on gasoline, diesel fuel or other petroleum products because it would affect a large class (every purchaser of petroleum products in the State of Alabama) and would not uniquely affect him, his family or a business with which he is associated.

The legislator should reassess whether he, his family, or a business with which he is associated are uniquely affected by the legislation as it progresses through the Legislature. Any revision which changes the size of the class affected from a large class to a small class of people of which he is a member, or other modifications which cause either him, his family or his business to be affected differently than other members of the affected class would create a conflict of interest for him.

Legislators are reminded, as well, that if a conflict of interest exists, legislative rules outside the Ethics Act require disclosure of that fact to their legislative colleagues through the

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filing of a report with the Clerk of the House or the Secretary of the Senate for inclusion in the Journal with the proceedings of the Session.

AUTHORITY

By 5-0 vote of the Alabama Ethics Commission on October 5, 2016.

A handwritten signature in dark ink, appearing to read "Jerry L. Fielding", is written over a horizontal line.

Jerry L. Fielding, Ret. Sr. Circuit Judge
Chair
Alabama Ethics Commission