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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

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ADVISORY OPINION NO. 2017-08

Ms. Deborah J. Long
Executive Vice President,
Chief Legal Officer and Secretary
Protective Life Corporation
Post Office Box 2606
Birmingham, Alabama 35202

Charitable donations to nonprofits affiliated with governmental entities including in-kind support

The Ethics Act does not prohibit the Company from donating to a charitable or nonprofit organization, either partially funded by, or directly affiliated with, a governmental body.

Protective Life is permitted to donate or provide in-kind support to a charitable organization, nonprofit, public entity, or nonprofit affiliated with a public entity without investigating whether any public official or public employee (or their family member) who sought the donation or support is receiving any personal gain from it, so long as Protective Life does not have actual knowledge of such personal gain and follows the steps outlined herein.

Activities qualifying as exceptions to the definition of “Contribution” under the Fair Campaign Practices Act/Hosting and inviting people to campaign events and making introductions

Within the context of a political campaign, a Company employee may host and invite people to attend a campaign event or meeting or introduce a public official to business leaders if that employee is volunteering their time or otherwise providing items or things other than “time” as specifically recognized in Ala. Code § 17-5-2(a)(3)(b)(1-6). This support by individuals would not be prohibited “things of value” under the Ethics Act.

Dear Ms. Long:

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.

QUESTIONS PRESENTED

Does the Ethics Act restrict the Company’s ability to donate to a charitable or nonprofit organization directly affiliated with a governmental body (e.g., a university foundation)? Does the answer change if the receiving entity is partially funded by a governmental body but also privately funded as a charitable or nonprofit organization (e.g., a university foundation)?

Does the answer change if the Company employee (who may also be a public official by virtue of his appointment to a statewide Board) and who is also on the board of the charitable or nonprofit organization or if a family member of the Company employee/public official is compensated by the charitable or nonprofit organization?

Does the Ethics Act restrict the Company’s ability to provide in-kind donations, such as participation or support at an event, to a charitable or nonprofit organization that is affiliated with, partially funded by, or established by a governmental body (e.g., allowing employees to volunteer and do readings at a local charitable or nonprofit organization during work hours and providing meals and transportation as part of the initiative)?

Is the Company able to make a donation to that organization (or purchase tickets to its fundraising events) without investigating whether the public official or employee requesting the

donation is directly, or through a family member, receiving any personal gain or impermissible benefit from it?

May a Company employee host a fundraiser or a “meet and greet” event for a public official running for office and invite others to attend without implicating the restrictions on providing a thing of value to a public official?

May a Company employee make introductions between a public official and other business leaders in the community without implicating the restrictions on providing a thing of value to a public official?

Does the answer change if the Company employee introduces a public official at a non-campaign event such as a charitable event?

FACTS AND ANALYSIS

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

Protective Life Corporation submits this request for an Advisory Opinion regarding Ethics issues that arise when the Company receives fundraising requests from charitable and nonprofit organizations and from public officials and employees supporting those organizations. This request also touches on other types of support that the Company and its employees provide.

In some areas, these questions are similar to those addressed by the Commission in Advisory Opinion No. 2016-29. However, the Commission stated in that Opinion that it applied “only” to that requester and that others may not rely on it. Protective Life submits this request to receive an opinion that is directed specifically to the Company in order to provide guidance on the proper way for their employees and the Company to interact with public officials, public employees, and public bodies in various contexts.

Protective Life Corporation provides financial services through the production, distribution and administration of insurance, annuities, and investment products. The flagship subsidiary, Protective Life Insurance Company, was founded in 1907. Protective’s home office is located in Birmingham, and it retains lobbyists. Therefore, Protective Life is a principal. Protective Life Corporation and its subsidiaries through the Protective Life Foundation, support numerous charities and nonprofit organizations across the state. The Foundation is a 501(c)(3) charitable organization under the IRS’ private foundation regulations. The Foundation is a separate legal entity from Protective Life Corporation and its subsidiaries (although there is overlap between the officers of Protective Life Corporation and the Board members of the Foundation). The Foundation does not employ lobbyists and is not a principal under the Alabama Ethics Act. Protective Life Corporation, its subsidiaries, and Protective Life Foundation are hereafter referred to as the “Company” unless the context, or Answer, specifies otherwise.

Each year numerous Company employees receive hundreds of requests for the Company to make donations to support various charitable and nonprofit organizations and to assist

governmental entities with various initiatives. Some of these requests for support may come from public officials and employees.

The Code's prohibitions and definitions control our Opinions and we cannot disregard that language arbitrarily. Therefore, as a starting point, it is worth restating the relevant Code sections to illustrate why answering questions regarding fundraising is complicated.

Ala. Code § 36-25-5(a) states that 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. (Emphasis added.)

Family member of the public official includes, "The spouse, a dependent, an adult child and his or her spouse, a parent, a spouse's parents, a sibling and his or her spouse, of the public official." Ala. Code § 36-25-1

Family member of the public employee includes, "The spouse or a dependent of the public employee." Ala. Code § 36-25-1

Business is defined as, "any legal entity", which would include nonprofits and charities. Ala. Code § 36-25-1.

Business with which the person is Associated includes, "Any business of which the person **or a member of his or her family** is an officer, owner, partner, **board of director member**, employee, or holder of more than five percent of the fair market value of the business." Ala. Code § 36-25-1 (Emphasis added.)

Under established rules of statutory construction, words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used, the Commission is bound to interpret that language to mean exactly what it says. See In re Inc. of Caritas Vill. v. Fuhrmeister, 152 So. 3d 1238 (Ala. 2014). Even when the language is clear, however, our interpretation is not controlled by the literal meaning or language of a statute, but by its spirit and intent when a literal application of the statute will produce results demonstrably at odds with the intention of the drafters. Therefore, it should be said as we have said, "The Commission recognizes that the Ethics Act should not unnecessarily impede philanthropic support and the good work done by charitable organizations, but at the same time, we point out the Code's instruction that the Act is to be construed liberally so as to protect the public interests." Ala. Code § 36-25-2 (AO2016-29).

Therefore, per the Code, neither a public official nor public employee can use their official position to provide “personal gain” to a business with which either they or a family member is associated. Applying the language of the Code includes seeking money for nonprofits on whose boards someone sits. There are, clearly and as we have found, exceptions in areas which are outside the “spirit and intent” of the Act, however.

Protective Life has asked very broad questions that are best answered on a case-by-case basis, most scenarios not fitting neatly into a “one size fits all” solution. In fact, the Courts have held that whether “personal gain” is realized is, in fact, determined on a case-by-case basis “as applied.” See *State v. Turner*, 93 So. 3d 876 (Ala. Crim. App. 2011). That being said, there is guidance we can give in this area based on the questions asked and specific guidance as it relates to the Company.

The Company first asks:

Does the Ethics Act restrict the Company’s ability to donate to a charitable or nonprofit organization directly affiliated with a governmental body (*e.g., a university foundation*)?

- Does the answer change if the receiving entity is partially funded by a governmental body but also privately funded as a charitable or nonprofit organization (*e.g., a university foundation*)?
- Does the answer change if the Company employee (who may also be a public official by virtue of his appointment to a statewide Board) and who is also on the board of the charitable or nonprofit organization or if a family member of the Company employee/public official is compensated by the charitable or nonprofit organization?
- Does the Ethics Act restrict the Company’s ability to provide in-kind donations, such as participation or support at an event, to a charitable or nonprofit organization that is affiliated with, partially funded by, or established by a governmental body (*e.g., allowing employees to volunteer and do readings at a local charitable or nonprofit organization during work hours and providing meals and transportation as part of the initiative*)?

The Ethics Act does not prohibit the Company from donating to a charitable or nonprofit organization, either partially funded by, or directly affiliated with, a governmental body. Advisory Opinion No. 2011-11 held that lobbyists and principals may contribute to a charitable or nonprofit organization, both monetarily and through in-kind donations, even if public officials/employees volunteer for the organization or serve on its Board. In other words, the Company is not prohibited from contributing to any charitable or nonprofit organization they wish to when there has been no solicitation, and absent facts showing intent to corruptly influence.

In the case of donations or support to public entities, including nonprofits affiliated with public entities (such as university foundations), as reflected in both AO 2016-29 (Bowden) and AO 2016-37 (Armstrong/Shattuck), the mere fact that a public official or public employee is employed by the public entity he or she is fundraising for does not mean that the public official or employee is realizing personal gain from a donation or support. Our opinions recognize that public officials and public employees can make solicitations benefitting the public even if the public is their employer under the Act's definitions. See AO 2015-15.¹ The beneficiary of those solicitations, however, must be the public entity, and consequently the public (or the nonprofit affiliated with the public entity). This approach would apply to the examples of public entities referenced in the Protective Life request, a city museum or the Alabama Women's Commission. As outlined in our past opinions, the donation must not be used to provide impermissible personal gain for the public official or employee or their family members. See AO 2016-37.²

The Code makes no distinction between nonprofit or for profit legal entities. Outside the context of a nonprofit existing to benefit a public entity as described above, public employees/public officials who are themselves (or who have family members who are) employed by or compensated for service by a nonprofit may not use their official positions for the benefit of "any business they're associated with," and that includes soliciting donations to the nonprofit. This standard also applies to Company employees who are also public officials and therefore may seek donations for nonprofits they support so long as the employee and their family members do not receive compensation from the benefitting organization. This rule would not apply in contexts we have specifically recognized to fall within exceptions, based on the unique facts presented in those opinions. See, e.g., AO 2017-01 (Gothard).

They next ask:

Is the Company able to make a donation to that organization (or purchase tickets to its fundraising events) without investigating whether the public official or employee requesting the donation is directly, or through a family member, receiving any personal gain or impermissible benefit from it?

This Opinion is given to Protective Life only, in the context of charitable, nonprofit, and public entity donations only, and is given to them in part based on the number of requests they receive annually for donations, the number of employees to whom the requests are directed, and the difficulty they would have in ensuring compliance with the Act within that context.

¹ "[T]he employees/officials serving on these are not being paid for their service on these committees, and for that reason are not 'serving two masters' through their service. Their loyalty on these committees is to the public only by virtue of their positions." AO 2015-15 (Boucher).

² "Therefore, the donations are not benefitting a "business" as contemplated in the Act or as recognized in Lambert. In the same way, donations to the nonprofit support organizations that exist solely to support their respective university; in other words if they simply direct all their funds to the University, they are not "businesses" as contemplated in the Act for the purposes raised and under the specific facts given to the Commission. They cannot, however, operate as mechanisms through which public officials and employees can convert the funds to their personal use." AO 2016-37 (Armstrong/Shattuck).

In the circumstances set forth in the above question, therefore, we approach this issue for Protective Life in the same manner as in Opinion No. 2016-29 and the following analysis would

apply to each of these questions. As a general matter, when a public official or employee (or their family member) seeks a donation for a charity, nonprofit, public entity, or nonprofit affiliated with a public entity, then that is an issue for the public official or employee (or family member) as well as the potential recipient of the donation to evaluate in terms of ethics compliance. Our approach is based on the fact that, as we have noted in the past, compliance with the Ethics Act is generally best managed by those who have the information necessary to ensure compliance.

Specifically, Protective Life is permitted to donate or provide in-kind support to a charitable organization, nonprofit, public entity, or nonprofit affiliated with a public entity without investigating whether any public official or public employee (or their family member) who sought the donation or support is receiving any personal gain from it, so long as Protective Life does not have actual knowledge of such personal gain. Protective Life can address this situation by:

(1) Obtaining a statement that any public official, public employee, or their family member seeking a donation or support is not being compensated by, or otherwise receiving personal gain from, the donation or support; and,

(2) Notifying the charitable organization, nonprofit, public entity, or nonprofit affiliated with a public entity receiving the support that it is their obligation to verify that the donation or support is in compliance with the Ethics Act.

Protective Life may not make any donation or provide support to any charitable organization, nonprofit, public entity, or nonprofit affiliated with a public entity for the purpose of corruptly influencing official action. Ala. Code § 36-25-7.

Finally, the Company asks:

May a Company employee host a fundraiser or a “meet and greet” event for a public official running for office and invite others to attend without implicating the restrictions on providing a thing of value to a public official?

- May a Company employee make introductions between a public official and other business leaders in the community without implicating the restrictions on providing a thing of value to a public official?
- Does the answer change if the Company employee introduces a public official at a non-campaign event such as a charitable event?

In this set of questions, the Company raises issues related to interactions its employees may have with public officials who are seeking elected office, and specifically limits their questions to hosting and inviting people to campaign events and introducing a candidate to other business leaders, etc. These activities raise 1st Amendment issues and are allowed under the Alabama Fair Campaign Practices Act (“FCPA”), Ala. Code § 17-5-1 et seq.

There is some support (even if it is considered to be a benefit or favor) that lobbyists/principals may lawfully provide to a public official because they are “contributions” under the FCPA, which means they are exceptions to the “thing of value” definition in the Ethics code. Certain kinds of support or activities that may not be “contributions” nonetheless fall within other political activity allowed under the FCPA that, likewise, would not be a prohibited “thing of value” in the Ethics code. The precise boundaries of what is not a “thing of value” under the Ethics Act when the support or activity is not also a reportable “contribution” per the FCPA cannot be determined definitively in this AO, however, because it is a fact-driven analysis.

To try to provide some guidance within the very limited scenarios presented, however, we start by acknowledging that what may be involved when one “hosts” a campaign event is unclear and could include any number of activities or facts that could make that activity a “contribution.” For example, if a Protective Life employee used Company resources to host a campaign event or to support a campaign, or if the Company reimbursed the individual who hosted the event, then, while permitted under the FCPA, this would likely be an in-kind contribution to the candidate because it would involve the payment of expenses of the campaign. The amount of such a contribution would be the value of the items or resources provided and would generally be reported in the candidate’s disclosure reports, but would also qualify as an exception to the definition of thing of value under the Ethics Act.

The Company’s questions focus on political or campaign activity that is not by definition a “contribution.” In order for “hosting” or inviting people to a campaign event or making introductions to qualify as an exception to the definition of “contribution,” the activity must fall within this definition: “the value of services provided without compensation by *individuals* who *volunteer* a portion or all of their *time* on behalf of a *candidate* or political committee.” (Emphasis added). Likewise, the other exceptions to the definition of “contribution” could apply to “hosting” an event, insofar as they involve volunteering the use of real or personal property, etc. which would cover items or things other than “time.” See Ala. Code § 17-5-2(a)(3)(b)(1-6). If time spent or other support falls within one of the exceptions, then they are by definition not “contributions” but would also not be prohibited “things of value” under the Ethics Act because they are specifically authorized political or campaign activity. For those kinds of political or campaign activities, simply serving as a host for an event, inviting people to attend, or making introductions would fall within the context of devoting “time” as well, which would neither qualify as a “contribution” nor as a prohibited “thing of value” under the Ethics Act.

This opinion does not address whether other political or campaign activities not specifically raised herein fall within any exception to the Ethics Act's definition of "thing of value" but reiterates that nothing can be given at any time for the purpose of corruptly influencing official action in violation of Ala. Code 36-25-7.

CONCLUSION

The Ethics Act does not prohibit the Company from donating to a charitable or nonprofit organization, either partially funded by, or directly affiliated with, a governmental body.

Protective Life is permitted to donate or provide in-kind support to a charitable organization, nonprofit, public entity, or nonprofit affiliated with a public entity without investigating whether any public official or public employee (or their family member) who sought the donation or support is receiving any personal gain from it, so long as Protective Life does not have actual knowledge of such personal gain and follows the steps outlined herein.

Within the context of a political campaign, a Company employee may host and invite people to attend a campaign event or meeting or introduce a public official to business leaders if that employee is volunteering their time or otherwise providing items or things other than "time," as specifically recognized in Ala. Code § 17-5-2(a)(3)(b)(1-6). This support by individuals would not be prohibited "things of value" under the Ethics Act.

AUTHORITY

By 3-0-1 vote of the Alabama Ethics Commission on June 7, 2017.


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