UNC SCHOOL OF GOVERNMENT

LOCAL GOVERNMENT LAW BULLETIN NO. 142 | NOVEMBER 2022

Conflicts of Interest for Public Officials on Nonprofit Boards: An Analysis of North Carolina G.S. 14-234.3

Kristina Wilson

CONTENTS

Kristina Wilson is an assistant professor of public law and government at the UNC Chapel Hill School of Government. Her areas of expertise include local government structure and authority, board procedures, open meetings law, and public records and transparency issues.

Special thanks to Connor Crews, Robert Joyce, and Kara Millonzi for their contributions to this bulletin.

I. Introduction

Chapter 14, Section 234(a)(1) of the North Carolina General Statutes (hereinafter G.S.) prohibits "public officers" and "employees" from deriving a "direct benefit" from the contracts they make or administer on behalf of the units they serve. A public officer or employee derives a "direct benefit" from a contract when either they or their spouse owns more than a 10 percent interest in an entity under contract, acquires income under the contract, or acquires property under the contract.[1] A public official or employee makes or administers a contract when the board, public body, or agency they serve acts on the contract, even when a conflicted public official or employee recuses themself from any involvement in the contract's creation or administration.[2] When a contract directly benefits a public official or employee, not only must the official or employee recuse themself from involvement in the approval or administration of the contract, but the official's or employee's board, public body, or agency also cannot enter into the contract unless an exception applies.[3]

In December of 2021, the North Carolina General Assembly enacted a companion section to G.S. 14-234(a)(1) in Session Law 2021-191 (S.B. 473). The new law, Section 14-234.3, creates an additional conflict of interest for contracts between units of local government and nonprofit organizations. In particular, Section 14-234.3 prohibits "public officials" who also serve as directors, officers, or governing board members of nonprofit organizations from participating in making or administering any contracts between those nonprofits and the public entities they serve.[4] When a governing board of a political subdivision of the state considers a contract with a nonprofit, including any award of money, board members in certain leadership positions at that nonprofit must recuse themselves from any involvement and record their recusal with the board's clerk.[5] Because knowingly violating these provisions is a Class 1 misdemeanor, local government officials are understandably concerned with the scope and application of G.S. 14-234.3.[6]

This bulletin offers a four-question framework for practitioners as they analyze potential conflicts arising under Section 14-234.3:

- Does the proposed transaction involve a "public official"?
- Does the proposed transaction involve a "contract"?
- Does the proposed transaction involve a "covered nonprofit"?
- What exceptions to the general prohibitions of G.S. 14-234.3 exist?

The bulletin also addresses practitioners' frequently asked questions, which the School of Government has collected since Section 14-234.3's enactment.

1. G.S. 14-234(a1)(4).
2. G.S. 14-234(a1)(3).
3. *Id.*
4. G.S. 14-234.3(a), (d)(1).
5. G.S. 14-234.3(a).
6. G.S. 14-234.3(b).

II. The Framework

A. Does the Proposed Transaction Involve a "Public Official"?

Section 14-234.3(a) prohibits "public official[s]" from "knowingly participat[ing] in making or administering a contract . . . with any nonprofit with which that public official is associated." Who, then, is a "public official" for purposes of G.S. 14-234.3(a)?

City Councilmembers and County Commissioners Are Public Officials under G.S. 14-234.3(a)

Under G.S. 14-234.3(d)(3), a "public official" is "any individual who is elected or appointed to serve on a governing board of a political subdivision of this State, [excluding] employee[s] and independent contractor[s]." At a minimum, of course, cities and counties are political subdivisions of the state.[7] As a result, the members of the governing board of any North Carolina municipality or county qualify as public officials under G.S. 14-234.3(d)(3). But do "political subdivisions" other than cities or counties exist in North Carolina? If so, did the General Assembly intend to extend the scope of G.S. 14-234.3(d)(3) to these other types of entities?

There is some evidence from the statute's construction and language that the legislature intended to extend this new prohibition only to the governing boards of municipalities and counties. In contrast to Section 14-234.3(d)(3)'s definition of "public official," above, Section 14-234(a1)(1) defines a "public officer" as "an individual who is elected or appointed to serve or represent a public agency." While no case law explicitly distinguishes between public agencies and political subdivisions, North Carolina courts have referred to public agencies and political subdivisions as separate entities, with "public agency" being the broader term.[8] According to *Black's Law Dictionary*, a public agency is "an official body esp. within the government, with the authority to implement and administer particular legislation" and includes "a political subdivision of a state" such as "counties, cities, school districts, etc."[9] Meanwhile, a political subdivision is "a division of a state that exists primarily to discharge some function of local government."[10] Other statutory definitions and case law underline the idea that a "public agency" is distinct from and more expansive than the term "political subdivision." For example, public records law defines "public agency" to include "the government and its subdivisions" and "other political subdivision[s]."[11] Based on other statutes' definition of these terms, the legislature's use of political subdivision potentially narrows the statute's scope.

Additionally, earlier drafts of Section 14-234.3 define "public official" as an individual elected or appointed to serve or represent a political subdivision of the state. Inserting "governing board" into the final definition of "public official" in Section 14-234.3 likely restricts its application to only those with authority or decision-making power over a political subdivision. Although internal legislative deliberations are not competent evidence of legislative intent, the debates are still useful to understand the bill's context.[12] Here, the House floor debate (beginning at 21:05)

---

7. *See, e.g.*, Doe v. Jenkins, 144 N.C. App. 131, 134 (2001).

8. *See, e.g.*, Fuller v. Easley, 145 N.C. App. 391, 395 (2001) (emphasis added) (discussing standing to bring a taxpayer action and referencing "public agenc[ies] *or* political subdivision[s]").

9. *Public agency* and *local agency*, Black's Law Dictionary (11th ed. 2019).

10. *Political subdivision*, Black's Law Dictionary (11th ed. 2019).

11. G.S. 132-1 (2022). *See also* Horne v. City of Charlotte, 41 N.C. App. 491, 495 (1979) (evaluating public agency liability for injuries caused by the exercise of eminent domain and noting that cities, counties, or other political subdivisions are subject to the same rules as general public agencies).

12. Elec. Supply Co. of Durham v. Swain Elec. Co., 328 N.C. 651, 657 (1991).

references "county commissioners," "city councilmembers," and "elected officials" explicitly.[13] Taken together, Section 14-234.3's context and history give some indication that the legislature intended a narrow application.

Still, if the legislature intended to limit the covered public officials to only city councilmembers, boards of county commissioners, boards of aldermen, and the like, it could have done so explicitly. Because it omitted an exclusive list, practitioners must consider whether the public official at issue is on the *governing board* of a *political subdivision* to evaluate the statute's scope.

Other Entities Aside from City Councils and Boards of County Commissioners May Qualify as Governing Boards

Aside from the municipalities and counties noted above, county boards of education have also been held to be political subdivisions.[14] Other cases, as well as statutes, have held area mental health authorities, local ABC boards, and sewer authorities to be political subdivisions.[15] Still other statutes use a more restrictive definition of political subdivision that only includes counties and incorporated cities, towns, and the like.[16] Given this variation, there does not appear to be a common law meaning of the term "political subdivision." Section 14-234.3 also did not explicitly incorporate any other statutory definitions of political subdivisions. As a result, practitioners cannot know for certain whether other statutory definitions of political subdivisions apply in the Section 14-234.3 context. Due to the lack of clarity, practitioners should assume that if there is any case law or other statutes indicating that the entity at issue is a political subdivision, then Section 14-234.3 may apply.

Recall that Section 14-234.3 only applies to individuals elected or appointed to a governing board of a political subdivision, but it fails to define what constitutes a governing board. No case has interpreted the plain meaning of "governing board," nor is the term defined in *Black's Law Dictionary*. North Carolina courts have interpreted the plain meaning of governing *body* to be an entity with ultimate decision-making power.[17] Some statutes define governing boards specifically as city councils, boards of county commissioners, boards of aldermen, and similar boards, but no clear, consistent definition arises from common law or statute.[18] Still, the North Carolina Court of Appeals' definition of governing body seems to make the most sense as a matter of plain meaning. To be a governing board, the entity likely should exercise some final decision-making power over a political subdivision.

---

13. North Carolina General Assembly, House Documents 2021, Audio Archives, 11-29-2021.mp3, https://webservices.ncleg.gov/ViewDocSiteFile/8281.

14. At least for purposes of the doctrine of *nullum tempus occurrit regi*, which holds that statutes of limitation and repose do not run against the state. *See* Rowan Cty. Bd. of Educ. v. U.S. Gypsum Co., 332 N.C. 1, 11–12 (1992).

15. G.S. 122C-116; Wright v. Blue Ridge Area Auth., 134 N.C. App. 668, 673 (1999). *See also* G.S. 18B-101; 162A-65(8).

16. *See, e.g.*, G.S. 166A-19.3(12).

17. *See, e.g.*, Student Bar Ass'n Bd. of Governors v. Byrd, 293 N.C. 594, 602 (1977) ("In ordinary speech, the 'governing body' of an institution, organization or territory means the body which has the ultimate power to determine its policies and control its activities.").

18. *See, e.g.*, G.S. 160D-102(17); 160A-576(2); 162A-65(6).

Takeaways

Practitioners should evaluate whether the entity they represent is a "governing board" of a "political subdivision." While there is limited evidence that the legislature intended to narrow the statute's coverage to governing boards of municipalities and counties, it failed to do so explicitly. Without more guidance from the legislature as to the meaning of "political subdivision" for purposes of Section 14-234.3, practitioners should review whether statutes explicitly label the entity they represent a "political subdivision" or if such an interpretation can be implied from existing case law. If the individual is on a board that has ultimate decision-making power and authority over a political subdivision as defined by other statutes or case law, that individual is likely a "public official" on a "governing board" and is thus presumptively subject to the new conflict of interest standards in Section 14-234.3.

B. Does the Proposed Transaction Involve a "Contract"?

Section 14-234.3(a) regulates any public official who participates in making and administering a "contract." In particular, it prohibits a public official from "making or administering a contract, *including* the award of money in the form of a grant, loan, or other appropriation" (emphasis added). As the plain language suggests, G.S. 14-234.3(a) is triggered *only if* a proposed transaction involves a contract. The legislature used the term "including" to illustrate the types of contracts that fall under this statute (i.e., contracts involving "award[s] of money in the form of a grant, loan, or other appropriation"), but if a public entity does not enter into a "contract," Section 14-234.3(a) does not apply.

A common concern following the adoption of Section 14-234.3 is how to structure the budget vote process. On the one hand, "appropriations" are specifically included in the types of awards of money referenced in the statute, which may indicate the legislature's intent to include budget votes. However, given the plain language of the statute, practitioners must first consider whether a budget appropriation is a contract under North Carolina law. To be enforceable under North Carolina law, a contract must consist of an offer, acceptance, and consideration.[19] Consideration is the "glue" of a contract.[20] Valid consideration "consists of 'any benefit, right, or interest bestowed upon the promisor, or any forbearance, detriment, or loss undertaken by the promisee.'"[21] In other words, one or both parties to a contract must be forfeiting or gaining a right or benefit in connection with the contracting process. "A mere promise, without more, lacks a consideration and is unenforceable."[22]

Budget appropriations are made by department, function, or project.[23] They are necessary to incur an obligation (enter into a contract), but they do not constitute a contract because they do not reflect a binding commitment of the local government. By appropriating funds, governing boards are not legally obligating themselves to actually provide the funding. The governing board making the appropriation therefore suffers no legally recognizable detriment or loss in connection with the appropriation and the funding recipients do not receive any corresponding benefit. As a result, the appropriation involves no consideration. Therefore, budget appropriations likely do not give rise to enforceable contracts under North Carolina law and should not

19. Lewis v. Lester, 235 N.C. App. 84, 86 (2014).

20. *In re* Foreclosure of Owen, 62 N.C. App. 506, 509 (1983).

21. Elliott v. Enka-Candler Fire & Rescue Dep't., Inc., 213 N.C. App. 160, 163 (2011), *quoting* Lee v. Paragon Grp. Contractors, Inc., 78 N.C. App. 334, 337–38 (1985), and Brenner v. Sch. House, Ltd., 302 N.C. 207, 215 (1981), *discretionary rev. denied*, 316 N.C. 195 (1986).

22. *Lewis*, 235 N.C. App. at 86 (quoting Stonestreet v. S. Oil Co., 226 N.C. 261, 263 (1946)).

23. G.S. 159-13.

implicate Section 14-234.3.[24] Moreover, budget appropriations are typically not the mechanism by which funds are actually delivered to recipients. Local governments must execute separate, written contracts to deliver the appropriated funds to private entities.[25] *Those contracts* would be at issue under Section 14-234.3 rather than the budget appropriations themselves.

Despite agreeing that budget appropriations are not contracts, many local government practitioners feel uncomfortable arguing that Section 14-234.3 does not apply to budget votes, given the lack of judicial or legislative guidance on this issue. As a result, practitioners have advised their local governments that Section 14-234.3 does apply to budget votes as a safe harbor approach. To guarantee proper recusals, a common practice is to remove conflicted appropriations from the budget ordinance to allow for a general vote. Governing boards then conduct piecemeal votes on budget amendments to reincorporate the conflicted appropriations into the budget. While this seems like a reasonable approach that does not appear to violate G.S. 14-234.3, it may violate budget laws. Under G.S. 159-8, local governments' annual budget must be balanced such that the sum of the estimated net revenues and appropriated fund balances equal the appropriations.[26] Removing a wide variety of appropriations is likely to impact the calculations required for a balanced budget and may lead to local governments adopting budgets that are not balanced in violation of G.S. 159-8. Also, the budget ordinance as amended must satisfy all requirements in Section 159-13, and there are limitations to the amendments that local governments can make following the adoption of their annual budget ordinances.[27] For example, a budget amendment may not increase or reduce the property tax levy or alter a taxpayer's liability unless certain exceptions apply.[28] Counties are also prohibited from reducing appropriations made to school units after the adoption of the annual budget ordinance.[29] Piecemeal amendments to the general budget ordinance increase the risk of violating these provisions.

UNC Chapel Hill School of Government Professor Frayda Bluestein suggests an alternative approach in her blog post "Excusing Board Members from Voting on the Budget."[30] Although written before the adoption of Section 14-234.3, her method still applies.[31] As Professor Bluestein explains, conducting preliminary votes on conflicted appropriations should happen *prior* to adopting the annual budget ordinance:

> Under this approach the board would take a preliminary (nonbinding) vote on the budget provision that involves the board member's interest and excuse the interested member from voting on it. If the matter passes then it can be incorporated into the final version of the budget ordinance. When the board

24. Frayda Bluestein, *Excusing Board Members from Voting on the Budget*, Coates' Canons: NC Loc. Gov't L. Blog (UNC School of Government, June 19, 2017), https://canons.sog.unc.edu/2017/06/excusing-board-members-voting-budget/.

25. G.S. 160A-16.

26. G.S. 159-8(a).

27. Bluestein, *supra* note 24.

28. G.S. 159-13(b)(5)–(6); Kara Millonzi, *Amending a Newly Adopted Budget Ordinance before July 1*, Coates' Canons: NC Loc. Gov't L. Blog (UNC School of Government, June 13, 2011), https://canons.sog.unc.edu/2011/06/amending-a-newly-adopted-budget-ordinance-before-july-1/.

29. G.S. 159-13(b)(9).

30. Bluestein, *supra* note 24.

31. *Id.*

> member later votes on the final version of the budget ordinance, it will be clear from the preliminary vote that the member's vote was not necessary to approve the provision that involves his or her financial interest.[32]

Using that approach in the Section 14-234.3 context, local government boards would have preliminary votes on potential appropriations to various nonprofits, and any conflicted board members would recuse themselves or be excused from those votes. If the appropriation passes by majority vote, it can be incorporated into the final budget ordinance, on which conflicted public officials *can* vote because the appropriation to their nonprofit was included in the budget without their involvement. This method appears to be a workaround that does not violate budgetary requirements.

Still, as explained above, no workaround should be necessary as Section 14-234.3 does not apply to budget appropriations and budget votes as written. All in all, local governments may need the legislature to clarify whether this section applies to budget votes. However, the plain language of the section applies first and foremost to contracts, and budget appropriations are not contracts under North Carolina law.

C. Does the Proposed Transaction Involve a "Covered Nonprofit"?

The conflict of interest standard in Section 14-234.3(a) extends only to contracts between governing boards of political subdivisions of the state and the "nonprofit [organization] with which [a] public official is associated." With the exclusion of boards, entities, or organizations created by the state or its political subdivisions, such a nonprofit organization would include (1) a "nonprofit corporation, or association, incorporated or otherwise, that is organized or operating in North Carolina primarily for educational, charitable, religious, scientific, literary, or public health and safety purposes," and (2) "of which the public official serves as a director, officer, governing board member."[33]

The enumerated purposes in G.S. 14-234(d)(1) mirror those in 26 U.S.C. § 501(c)(3), which exempts certain entities from federal income tax. It therefore may be tempting to assume that an entity must have secured an exemption from federal income tax to fall within the scope of G.S. 14-234.3(a).

However, the legislature did not explicitly limit this definition to entities with federal tax-exempt status. As written, Section 14-234.3 applies to nonprofit entities that are organized or operating in North Carolina primarily for the enumerated purposes, *regardless* of their tax-exempt status. While Section 501(c)(3) status is likely a good indication that a nonprofit falls within this statute's scope, federal tax-exempt status is not outcome determinative.

Using the statutory definition, practitioners must first analyze whether the contracting nonprofit entity is organized or operating in the state primarily for educational, religious, literary, scientific, charitable, or public health and safety purposes. If so, they should ask whether the entity was created by the state or its political subdivisions. If the state or its political subdivisions created the contracting nonprofit entity, Section 14-234.3 does not apply. Finally, they should ask whether the involved public official holds a leadership position with the contracting nonprofit organization. The public official must be a director, executive, officer, or

32. *Id.*
33. G.S. 14-234.3(d)(1).

governing board member of the nonprofit for Section 14-234.3 to apply. A public official who is merely a volunteer, low-ranking member, or informal participant will not have a conflict under this statute.

Stated differently, there are three ways that a nonprofit will fall outside of Section 14-234.3's scope:

1. the nonprofit does not operate primarily for the enumerated purposes,
2. the state or its political subdivisions created the nonprofit, or
3. the involved public official does not hold a leadership position with the nonprofit.

Assessing whether a nonprofit operates for one of the enumerated purposes will likely require a case-by-case analysis of the specific nonprofit at issue. As to the second option, what does it mean to be created by the state or its political subdivisions? Without statutory definitions, practitioners must rely on plain meaning. To create a nonprofit entity, the state or its political subdivisions likely needs to take some formal legal action in the form of a statute, resolution, ordinance, policy, or other procedure. As a result, there should be some formal, legal action executed by the state or a political subdivision that establishes or founds a nonprofit entity. The closer an entity is to this direct type of creation, the more likely it is to be found to be created by the state or a political subdivision and therefore exempt from the statute.

Many nonprofits are partnerships, meaning that local governments are not the sole creators or founders but rather assist in their creation. Is being a partner in creation sufficient to exempt a nonprofit entity from Section 14-234.3? The statute does not say "primarily created by" nor does it say "created at least in part by" the state or its political subdivisions. Arguably, partnering to create an entity still qualifies as creating that entity. Still, there likely needs to be some evidence of the political subdivision's involvement in the form of a formal, legal action establishing the nonprofit entity.

Takeaways

In sum, three elements need to be present for Section 14-234.3 to apply. First, the scenario must involve a covered public official, meaning an individual elected or appointed to serve on a governing board of a political subdivision. Second, there must be a contract at issue. Third, that contract must be with a qualifying nonprofit. To be a qualifying nonprofit, the organization must operate primarily for religious, educational, charitable, literary, scientific, or public health purposes. Moreover, the state or a political subdivision must not have created the nonprofit entity. Finally, the contracting public official must also serve in a leadership capacity at the nonprofit; it is not enough for the public official to merely be a volunteer or informal member. If all three of these elements are met, Section 14-234.3 applies.

D. What Exceptions to the General Prohibitions of G.S. 14-234.3 Exist?

Section 14-234.3 includes several exceptions to the general prohibition in G.S. 14-234.3(a). The primary exception is in Subsection (a). Under that provision, an entity can execute a contract with a covered nonprofit once conflicted public officials record their recusal with the clerk of the political subdivision's governing board and cease to have any involvement with making or administering the contract. Upon meeting that condition, and assuming the board otherwise authorizes the approval of the contract, the board can complete the contract without further conditions.

Oddly, Section 14-234.3(b) incorporates exceptions from Sections 14-234(b) and (d1) through (d5). In the Section 14-234 context, these exceptions allow a governing board to execute a covered contract without legal penalties, even when a board member may derive a direct benefit from the contract. Crucially, neither the Section 14-234(b) exceptions nor the Sections 14-234(d1) through (d5) exceptions allow the conflicted public official to participate in making or administering the contract; the conflicted public official must always recuse. Thus, these exceptions actually refer to the governing board's ability to contract, not to the public official's ability to participate. No Section 14-234 exception allows a conflicted public official to participate.

The incorporated exceptions from Sections 14-234(b) and (d3) through (d5) exempt certain types of contracts, including

- contracts with a bank, banking institution, savings and loan association, or with a public utility;
- property interests conveyed by public officials or employees under a condemnation judgment in a proceeding initiated by the public agency;
- employment relationships between a public agency and the spouse of a public officer of that agency;
- employment relationships between a local board of education and the spouse of the superintendent of that local school administrative unit, if that employment relationship has been approved by that board in an open session meeting pursuant to the board's policy adopted as provided in G.S. 115C-47(17a); and
- remuneration from a public agency for services, facilities, or supplies furnished directly to needy individuals by a public officer or employee of the agency under any program of direct public assistance being rendered under the laws of this state or the United States to needy persons administered in whole or in part by the agency if certain conditions are met.

It is difficult to imagine how the above contracts would arise in the context of contracting with a nonprofit entity, but the legislature incorporated them nonetheless.

Section 14-234.3 also incorporates exceptions from Sections (d1) and (d2) of Section 14-234. Section 14-234(d1) contains the "small jurisdiction" exception. In the Section 14-234(a) context, this exception allows governing boards in certain smaller cities and counties to legally execute contracts even when a public official derives a direct benefit. Under the small jurisdiction exception, a local governing board can execute an enforceable contract even when a public official derives a direct benefit if the following conditions are met:

- the city has a population of less than 20,000 or the county has no city within it with a population of more than 20,000;
- the contract is adopted in an open and public meeting and recorded in its minutes, and the contract amount does not exceed twenty thousand dollars ($20,000) for medically related services or sixty thousand dollars ($60,000) for other goods or services within a twelve-month period;
- the official entering into the contract with the unit or agency does not participate in any way or vote;
- the total annual amount of contracts with each public official is specifically noted in the audited annual financial statement of the village, town, city, or county; and
- the governing board posts in a conspicuous place and updates quarterly a list of all public officials with whom such contracts have been made, describing the subject matter of the contracts and showing their total amounts for the past year.

What do these exceptions mean as incorporated into Section 14-234.3? The exceptions in Sections 14-234(b) and Sections 14-234(d3) through (d5) seem unlikely to apply with any regularity. Regardless, for them to apply, the impacted public official would still need to recuse under Section 14-234(a). Similarly, how does the small jurisdiction exception apply in this context? This exception would allow the governing board to proceed with the contract, despite a public official's leadership position in the contracting nonprofit organization, so long as the public official recused and all other procedural requirements in Subsection (d1) were met. Interestingly, Section 14-234.3(a) already explicitly states that the contract can proceed if the involved public official recuses and records this recusal with the governing board's clerk. As a result, incorporating the Section 14-234 small jurisdiction exception seems redundant or at the very least unnecessary. Section 14-234.3(a) has already provided a seemingly less burdensome mechanism for the governing board to continue to contract without criminal penalties or the contract becoming void.

The legislature's motivation for including the Section 14-234 exceptions is unclear as they do not seem to serve any purpose. The takeaway for Section 14-234.3 is that conflicted public officials must always recuse, record their recusal with the clerk, and cease any involvement with making or administering the contract with the nonprofits with which they are associated. There are no exceptions that allow a conflicted public official to participate.

III. How Can Covered Public Officials Comply with Section 14-234.3?

Section 14-234.3 carries criminal penalties, and, if it applies to a particular situation, covered public officials must comply with its recusal requirements. Knowingly violating this section is a Class 1 misdemeanor under Subsection (b) for both the governing board of a political subdivision and conflicted public officials. Moreover, Subsection (c) automatically voids contracts that violate this section. As a result, when public officials have a conflict under Section 14-234.3, they should ensure that their recusal is recorded either in the meeting minutes with the board's clerk or in a separate document maintained by the clerk.

The section requires only that covered public officials record their recusal with the clerk.[34] Aside from this requirement in G.S. 14-234.3(a), the statute provides no procedural guidance for recusal. It does not require formal board action or approval to excuse a conflicted public official, and the public official seemingly can recuse without declaring the conflict or otherwise notifying the rest of the board, so long as the recusal is recorded with the clerk. However, while the statute apparently permits public officials to recuse themselves, this method is not the most transparent procedure. The better approach would be for public officials to declare their conflicts and have boards formally excuse them via majority vote. The vote and the recusal could then be recorded in the meeting minutes. Recording recusals in meeting minutes is likely more efficient than creating a separate recusal document outside of any formal context. Since the statute does not specify any format for the recusal recording, documenting recusals in meeting minutes appears to be a safe harbor approach that increases transparency and clarity.

Under Subsection (a), if conflicted public officials record their recusal with the clerk and abstain from participating in making or administering the contract at issue, the board can execute the contract without criminal penalties and without the contract becoming void. Under

34. G.S. 14-234.3(a).

Subsection (d)(2), public officials participate in making or administering a contract when they deliberate or vote on the contract; attempt to influence anyone who is deliberating or voting on the contract; or solicit gifts, rewards, or favors in exchange for recommending, attempting to influence, or influencing the award of the contract. Practitioners have asked whether a conflicted public official must physically leave the room during deliberations or voting on the contract at issue. While doing so would certainly eliminate even the appearance of an attempt to influence the vote, the statute does not seem to require this. If public officials know that their presence during deliberations or voting will influence the voting members, then it may be wise to leave the room entirely. Otherwise, conflicted officials likely may remain in the room if they can abstain from any form of participation.

Practitioners have also asked whether discussing the merits of the nonprofit at issue could constitute an attempt to influence voting or deliberations. Merely talking about the nonprofit generally while the board considers a contract with that nonprofit may be dangerous in light of the statute because such discussion could be construed as an attempt to influence the vote. The least risky approach is to abstain from discussing the contract or the nonprofit when a public official who holds a leadership position with it is present.

IV. Frequently Asked Questions

This section will address some additional questions practitioners have.

A. Does Section 14-234.3 Apply on the Nonprofit Side?

In other words, does the statute require a local governing board member to recuse while acting in a nonprofit leadership capacity? The statute does not squarely address this question, but the answer is arguably yes. Section 14-234.3(d)(2) prohibits public officials from deliberating or voting on contracts with nonprofits when they hold leadership positions with those nonprofits. Subsection (d)(2)(b) also prohibits any attempts to influence such votes. In broadly restricting public officials from engaging in this conduct, the statute does not distinguish between a public official acting in a governing board capacity versus a public official acting in an individual, personal, or nonprofit capacity. The statute simply prohibits these behaviors by a public official.

Subsection (d)(3) defines "public official" as "any individual who is elected or appointed to serve on a governing board of any political subdivision of this State." Even when not acting in that capacity, a local governing board member would remain an individual elected or appointed to serve on a governing board. A local governing board member acting in a nonprofit or personal capacity would therefore still qualify as a public official for purposes of the statute. Moreover, participating in discussions even in a nonprofit capacity could qualify as an attempt to influence the vote under Subsection (d)(2)(b). As a result, voting, deliberating, or even discussing the vote or contract might subject a local governing board member to liability even on the nonprofit side.

The statute's repeated references to governing boards of political subdivisions of the state may seem to suggest that the legislature intended this section to apply to local governing boards more than to nonprofit entities. However, the language could be broad enough to extend to the nonprofit context. Without further judicial or legislative guidance, it may be prudent for impacted local officials to recuse themselves in both their local governing board and nonprofit capacities.

B. Is This a Qualifying Nonprofit?

Many of the common questions surrounding Section 14-234.3 pertain to whether certain entities are qualifying nonprofit organizations under the statute. Common entities that have prompted questions are chambers of commerce, community colleges, and volunteer fire departments. As discussed earlier, for a nonprofit to fall under Section 14-234.3's purview, it must be organized or operating in the state primarily for educational, religious, literary, scientific, charitable, or public health and safety purposes. Practitioners must then ask whether the entity was created by the state or its political subdivisions. While the statute is unclear as to what is required for an entity to be considered created by the state or its political subdivisions, there likely should be some evidence that the state or political subdivision took formal, legal action to intentionally establish or found the nonprofit entity. Perhaps this means there is a statute, resolution, ordinance, or other formal action memorializing the institution of the nonprofit entity. If the state or a political subdivision created the entity, Section 14-234.3 does not apply.

Chambers of Commerce

Does Section 14-234.3 cover chambers of commerce? While they can be designated as nonprofit organizations, do they operate primarily for at least one of the enumerated purposes? Evaluating this factor will be heavily fact-specific and will likely depend on each chamber's stated goal and mission. By way of example, the Greensboro Chamber of Commerce describes itself as an "economic development organization" designed to help businesses succeed and grow, "with special emphasis placed on community and entrepreneurial advancement."[35] The Chamber for a Greater Chapel Hill-Carrboro and the Charlotte Regional Business Alliance also state goals of helping business leaders and promoting economic development through providing networks, community, resources, and opportunities.[36] While all three of these chambers have Section 501(c)(6) nonprofit status, their stated missions appear inconsistent with the primary enumerated purposes in Section 14-234.3.[37] These three may not be considered qualifying nonprofits for that reason, but each chamber may be different, requiring a case-by-case inquiry.

If the chamber at issue does operate primarily for one of the enumerated purposes, the next question is whether the state or a political subdivision created the chamber. As noted previously, many chambers are partnerships, meaning that local governments are not the sole creators or founders but rather assist in their creation. In some cases, this partnership may only mean providing funding. Is providing funding sufficient to have created a nonprofit entity? The answer is likely no. Creating a nonprofit entity seems to require some formal action on the part of the state or political subdivision establishing the existence of or instituting the nonprofit in some way. The political subdivision should have some hand in the actual founding of an entity to have created it. Merely providing funds to support an entity that has already been created likely does not qualify as creation under the plain meaning of Section 14-234.3. However, if a political

35. Greensboro Chamber of Commerce, *About Us*, https://greensboro.org/about/ (last visited Nov. 16, 2022).

36. The Chamber for a Greater Chapel Hill-Carrboro, *About the Chamber*, https://www.carolinachamber.org/about-the-chamber/ (last visited Nov. 16, 2022); Charlotte Regional Business Alliance, *About Us*, https://charlotteregion.com/pages/about-us/ (last visited Nov. 16, 2022).

37. See the following entries from *Nonprofit Explorer*, ProPublica's database of tax-exempt organizations: Greensboro Area Chamber of Commerce, https://projects.propublica.org/nonprofits/organizations/560245040; Chapel Hill Carrboro Chamber of Commerce, https://projects.propublica.org/nonprofits/organizations/560798467; Charlotte Regional Business Alliance, https://projects.propublica.org/nonprofits/organizations/560173610 (all visited Nov. 16, 2022).

subdivision is a founder or a partner in the founding of a chamber of commerce, that chamber is likely to be exempt from Section 14-234.3. Still, since there is no general rule for chambers of commerce, they should be evaluated individually.

Community Colleges

Many practitioners have also asked about community colleges. As with chambers of commerce, there is no general rule and each college will need to be considered on a case-by-case basis. Arguably, community colleges are not nonprofits but rather governmental entities. At least one North Carolina case, although unpublished, has described community colleges as "administrative agencies, created with the approval of the General Assembly."[38] Additionally, on the federal level, community colleges are considered arms of the state for Eleventh Amendment immunity purposes.[39] If community colleges are governmental entities, they likely would not qualify as nonprofits under Section 14.234.3 in the same way that cities and counties are not qualifying nonprofits. While many community colleges have affiliated nonprofit foundations, often the colleges themselves are not classified as nonprofits and do not describe themselves that way.[40] Still, conceivably there could be some community colleges that operate as nonprofit entities. If that is the case, it may be difficult to try to characterize those schools as governmental agencies or entities rather than nonprofits. If the community college at issue operates as a not-for-profit entity, describes itself as such, and operates primarily for educational purposes, there is an argument that that school *does* fall under Section 14-234.3.

If community colleges are qualifying nonprofits, practitioners then must examine if they are created by the state or its political subdivisions. Whether community colleges are created by a political subdivision is a borderline question. While these entities are often authorized or administered by government agencies, is authorizing the creation of or administering an agency the same as creating it? Administration or authorization implies giving permission for the creation, not necessarily the actual act of creating or establishing. Meanwhile, the plain language of G.S. 115D-1 establishes a *system* of institutions, but not necessarily the institutions themselves. Similarly, G.S. 115D-4 subjects community colleges to the approval of the General Assembly and such approval may not be necessary had the state created the institutions. These provisions could indicate state management rather than state creation.

On the other hand, the creation of a community college could be considered the joint operation of the local county and the state. Section 1B 200.1 of the state's community college code reads: "An application for a new college must come from the county commissioners in the proposed administrative area."[41] The commissioners apply and the state, through the State Board of Community Colleges, approves or disapproves the application under G.S. 115D-4. As a result, a community college could be jointly created by the state and the county. The fact that both the

38. Gasper v. Bd. of Trs. of Halifax Cmty. Coll., No. COA11-675, 2012 WL 380055, at *3 (N.C. Ct. App. Feb. 7, 2012).

39. Md. Stadium Auth. v. Ellerbe Becket Inc., 407 F.3d 255, 263 (4th Cir. 2005). *See also* McAdoo v. Univ. of N.C. at Chapel Hill, 248 F. Supp. 3d 705, 719–20 (M.D.N.C. 2017).

40. *See, e.g.,* Central Piedmont Community College, *Business and Industry*: Services Corporation, https://www.cpcc.edu/business-and-industry/services-corporation (last visited Nov. 16, 2022); Forsyth Tech Community College, *Giving: The Forsyth Tech Foundation,* https://www.forsythtech.edu/giving/ (last visited Nov. 16, 2022); Wake Tech Community College, *Wake Tech Foundation*, https://www.waketech.edu/wake-tech-foundation (last visited Nov. 16, 2022).

41. NC Community Colleges, *State Board of Community Colleges Code* (SBCCC), 1B SBCCC 200.1, "Establishing Colleges," https://www.nccommunitycolleges.edu/sbcccode.

state and the county have a hand in the creation could indicate that the exclusion in Section 14-234.3(d)(1) does apply. While there are no published cases addressing this specific question, a solid argument could likely be made to characterize community colleges as state- and county-created institutions that qualify for an exception.

Volunteer Fire Departments

Volunteer fire departments also prompt frequent questions. They generally operate as nonprofit organizations primarily for the purpose of public health and safety, which would seem to pull them into Section 14-234.3's scope. As with the other entities, the question then becomes: Are volunteer fire departments created by the state or its political subdivisions? This will likely depend on each individual department. Practitioners will need to ask whether the relevant governing board or the state took some formal legal action to establish the volunteer fire department. Conversely, was the department independently formed by citizens or another entity with mere approval from the local governing board? If independently formed, the entity is less likely to be seen as created by the political subdivision. Approving an entity is different from directly creating the entity.

C. How Does Section 14-234.3 Interact with Statutory Duties to Vote?

G.S. 153A-44 and 160A-75 impose a duty to vote on city and county governing board members in all but a few scenarios. Those exceptions include financial interests, official conduct matters, and statutory exceptions under Section 14-234 and Section 160D-109.[42] The legislature has not yet edited either statute to include exceptions for Section 14-234.3's new conflicts, however, it likely overrides the statutory duty to vote in this instance, especially given its criminal penalties. If it did not override the statutory duty to vote, these sections would be fundamentally incompatible; the legislature cannot have intended to force governing board members to subject themselves to criminal penalties in order to comply with their duty to vote. Therefore, the mandatory language and criminal penalties in Section 14-234.3 seem to implicitly trump the statutory duty to vote in Sections 153A-44 and 160A-75. Still, the legislature may consider a technical correction to those sections in order to make clear that Section 14-234.3 is an exception to board members' duty to vote as well.

D. Does the Small Jurisdiction Exception Apply Only to the Misdemeanor Charge or to the Recusal Requirement?

As discussed earlier, the legislature incorporated the small jurisdiction exception from G.S. 14-234 into Section 14-234.3.[43] Practitioners have wondered whether the legislature intended to exempt smaller jurisdictions from the statute's scope entirely. Subsection (b) notes that the G.S. 14-234 exceptions apply to the "section" rather than to the "subsection," meaning that the exceptions would apply not only to the misdemeanor charge described in Subsection (b) but to the entirety of Section 14-234.3.

However, if the legislature intended to completely exempt smaller jurisdictions from Section 14-234.3's scope, it failed to do so in the actual language it used. Looking closely at the small jurisdiction exception in G.S. 14-234(d1) demonstrates that for the small jurisdiction exception to apply at all, the involved public officials still must recuse themselves.[44] Stated differently, the small jurisdiction exception does not apply in any scenario unless the involved public official

42. G.S. 153A-44; 160A-75(a).
43. G.S. 14-234.3(b).
44. G.S. 14-234(d1)(2).

recuses. Thus, applying the small jurisdiction exception does not actually exempt smaller jurisdictions from Section 14-234.3 in practice; the involved public officials would still have to recuse themselves. Therefore, the small jurisdiction exception, as it's written, has no practical impact in the context of Section 14-234.3.

If the intent is to entirely exempt smaller jurisdictions, the legislature could consider explicitly excluding cities with populations of less than 20,000 and counties that contain no cities with populations of more than 20,000 from the entire section in an edited Subsection (b) rather than incorporating exceptions from other statutes.

V. Conclusion

Properly navigating Section 14-234.3 starts with identifying whether the scenario involves a public official for purposes of the statute. Is the involved individual a member of a governing board of a political subdivision? Does the individual also hold a leadership position with a qualifying nonprofit? Practitioners should then evaluate whether the scenario involves a contract. Section 14-234.3 applies to contracts first and foremost. If no contract is at issue, Section 14-234.3 will not apply. Practitioners should next analyze whether the contract is with a qualifying nonprofit. Does the contracting nonprofit entity operate primarily for the enumerated purposes? Was it created by the state or a political subdivision? Does the involved public official hold a leadership position with the contracting nonprofit? Finally, practitioners must determine whether any exceptions apply. Have the involved public officials recused themselves and recorded their recusals with the governing board's clerk? If so, their units may continue to execute the contracts at issue without running afoul of the statute.

After conducting this analysis, if practitioners conclude that Section 14-234.3 applies, they must advise conflicted officials to recuse and record their recusals with the clerk. Section 14-234.3 does not prescribe any exact recusal procedures. Conceivably, a conflicted public official can merely inform the clerk of their conflict. The clerk must then take some action to record the recusal. Since the statute does not specify, this recording could take the form of a separate document or could be part of meeting minutes. The conflicted public official then cannot have any involvement with the contract vote at issue, but the unit can continue to execute the contract.

As this bulletin has discussed, there are several lingering questions for the legislature or the judicial branch to address:

1. How should practitioners understand the scope of what constitutes a governing board of a political subdivision for purposes of this statute?
2. What is required for a nonprofit to be "created by" the state or its political subdivisions?
3. What is required for there to be a sufficient recording of a public official's recusal?
4. What purpose do the incorporated G.S. 14-234 exceptions serve, and how are practitioners to understand them in the Section 14-234.3 context?

Hopefully, clarification will be forthcoming, but until then, practitioners may rely on the statute's plain meaning and existing statutes and case law to guide their good-faith interpretations.