



# LOCAL GOVERNMENT LAW BULLETIN

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## 2006 ETHICS AND LOBBYING REFORM: APPLICATIONS AND IMPLICATIONS FOR LOCAL GOVERNMENTS

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The 2006 short session of the North Carolina General Assembly concluded with passage of one of the most significant new laws legislators considered during the session. The State Government Ethics Act (S.L. 2006-201) (the Act) establishes ethical standards for the conduct of state officials in all three branches of government and imposes broad new regulations and restrictions on those officials and on individuals and entities that seek to influence their actions. The Act incorporates provisions from Governor Michael Easley's Executive Order No. 1 (imposing ethical standards on certain executive branch officials) and from several pieces of legislation introduced during the short session. The Act also supersedes the lobbying reform legislation passed during the preceding long session (S.L. 2005-456).

The Act is divided into three main parts. Part I creates a new chapter of the North Carolina General Statutes (hereinafter G.S.) entitled the State Government Ethics Act (Chapter 138A). It establishes standards for ethical conduct and conflicts of interest for many state officials and employees in the legislative, executive, and judicial branches. Part II makes conforming changes to the Legislative Ethics Act (Article 7 of Chapter 120). Part III creates a new law (Chapter 120C) to regulate those who lobby legislative and executive branch officials.<sup>1</sup> The majority of provisions in the State Government Ethics Act went into effect on January 1, 2007. This bulletin focuses on Parts I and III of the Act as the changes in Part II apply solely to members of the General Assembly.

The new ethics act is primarily intended to set ethical standards for the actions of state government officials and those who seek to influence them. A quick reading of

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1. The new Chapter 120C is a complete rewrite of Article 9A of Chapter 120, which formerly governed lobbying of members of the General Assembly.

the Act could lead to the erroneous conclusion that it is not relevant to local government officials and their employees. A more careful review, however, makes it clear that certain of its provisions do apply to local governments, while other provisions may do so. Using a question-and-answer format, this bulletin distinguishes among provisions of Parts I and III that clearly do apply to county and municipal officials and employees, those that clearly do not apply to local governments, and those for which the answer is currently uncertain. Over time, some of the issues identified in this bulletin (as well as others that will surely arise as the Act is fully implemented) may be resolved by the interpretations of the newly established State Ethics Commission or by the General Assembly itself.

## Ethics—G.S. Chapter 138A

Part I of the new ethics law puts in place statutorily mandated standards of conduct for certain categories of public officials (covered persons) in the performance of their duties. The standards apply to all official activities regardless of whether the specific activity involved constitutes lobbying. Although the chapter also includes certain restrictions that affect the activities of lobbyists and their principals, those provisions are only some of the law's wide-ranging effects.

### Persons Covered under the Chapter

The first task in examining the potential application of G.S. Ch. 138A to local governments is determining who is subject to its requirements and prohibitions.

#### 1. Who is covered under the new ethics requirements?

A wide array of public officials is subject to the provisions of the chapter. These include:

- *Legislators.* Current members of the North Carolina General Assembly, persons elected or appointed to the Senate or House of Representatives who have not yet assumed office, and the lieutenant governor when presiding over the Senate. (When not presiding, the lieutenant governor is a "public servant," as defined below.)
- *Legislative employees.* Employees of the General Assembly, consultants and counsel

to legislative chambers, and committee and commission members who are paid by state funds.

- *Judicial officers.* Justices of the North Carolina Supreme Court, judges of the North Carolina Court of Appeals, superior and district court judges, district attorneys, clerks of court, and persons elected or appointed to these offices who have not yet assumed office.
- *Public servants.* A number of public officials in the executive branch (as well as those elected or appointed to office who have not yet assumed that office), including
  - constitutional officers (governor, lieutenant governor, attorney general, state auditor, state treasurer, superintendent of public instruction, secretary of state, commissioner of agriculture, commissioner of labor, and commissioner of insurance)
  - employees of the Office of the Governor
  - heads of all principal state agencies ("cabinet secretaries") appointed by the governor (Departments of Cultural Resources, Health and Human Services, Revenue, Crime Control and Public Safety, Correction, Environment and Natural Resources, Transportation, Administration, Commerce, and Juvenile Justice and Delinquency Prevention)
  - chief deputies and chief administrative assistants to constitutional officers and cabinet secretaries
  - confidential assistants and secretaries to constitutional officers, cabinet secretaries, and their chief deputies and chief administrative assistants
  - certain exempt policy-making employees (as designated by the governor) and their confidential secretaries<sup>2</sup>
  - judicial employees (the director and assistant director of the Administrative Office of the Courts and any other judicial employee designated by the chief justice whose annual salary is greater than \$60,000)

2. This category of employees consists of those designated under G.S. 126-5(d)(2) or (2a).

- all voting members (including ex officio) of nonadvisory state boards, councils, commissions, committees, task forces, or similar bodies created by either statute or executive order (including the State Ethics Commission)
- certain University of North Carolina officials, including voting members of the Board of Governors and boards of trustees of constituent institutions, the president, vice presidents, chancellors, and vice chancellors
- certain North Carolina Community College officials, including voting members of the State Board of Community Colleges and the boards of trustees of community colleges, presidents, chief financial officers, and chief administrative officers of the Community College system and all community colleges
- individuals working under contract with the state in any of the above positions

Except for legislative employees, all of the above officials and personnel are described as “covered persons” in G.S. Ch. 138A. Although not included in the definition of a covered person, legislative employees are subject to a number of the provisions of the chapter.<sup>3</sup>

### **2. Are local elected officials subject to the new ethics law?**

No. Local elected officials (county commissioners, city council members, mayors, sheriffs, registers of deeds, school board members, soil and water conservation district supervisors, and so on) are not covered persons as that term is defined in G.S. Ch. 138A and are not subject to its requirements.

### **3. What if a local official also serves in another position that is covered under the new ethics law?**

It is not uncommon for local elected officials also to serve in other capacities. If the particular position meets the statutory definition of either a covered person or a legislative employee, it will subject the local official to the requirements of the new ethics law.

As discussed in Question 1 above, the category of covered persons includes legislators, judicial officers, and public servants. Local government officials holding more than one position are most likely to be holding a public servant position. As outlined in

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3. G.S. 138A-3.

Question 1, a public servant includes (but is not limited to) the following:

- A voting or ex officio member of a nonadvisory state board or commission
- A member of the UNC Board of Governors or a trustee of a UNC constituent institution
- A member of the State Board of Community Colleges or a trustee of a community college
- An employee of the state in a position identified in Question 1 as a public servant.

A local elected official who also serves in a covered person position or is a legislative employee will be required to comply with all provisions of the new ethics chapter applicable to that position. Those provisions apply to the person *at all times and in all situations*, including in private life—not just in those activities that directly involve the covered position.

*Example:* County Commissioner Smith also serves as a voting member of a nonadvisory state board—the Coastal Resources Commission (CRC). Membership on the CRC makes him a public servant under the Act. He is therefore subject at all times to the provisions of the ethics law governing public servants—even when he is acting as a county commissioner or in his private capacity and not as a CRC member. One of the restrictions the Act imposes on public servants (and on legislators and legislative employees) is a general prohibition against accepting gifts from lobbyists and their principals.<sup>4</sup> Because he is a public servant, Commissioner Smith cannot accept a gift from a lobbyist or lobbyist’s principal, even if the gift is given to him in his capacity as a county commissioner and not in his capacity as a CRC member.<sup>5</sup>

### **4. Are local appointed officials subject to the new ethics law?**

No. Like local elected officials, local appointed officials such as county managers, finance officers, and tax assessors are not covered persons as that term is defined in the new ethics law and thus are not subject to its requirements. However, a local appointed official who also serves in another capacity as a covered person will be required to comply with

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4. See Question 33 for definitions of “lobbyist” and “lobbyist’s principal.”

5. G.S. 138A-32(e) sets out a number of exceptions to the prohibition of gifts from lobbyists and lobbyists’ principals.

all applicable provisions of the new ethics chapter at all times and in all situations, regardless of whether that official is acting in his or her capacity as a covered person (see Question 3).

**5. Are local government employees subject to the new ethics law?**

No. Like local elected and appointed officials, local government employees and employees of local school systems are not covered persons as defined in the new ethics chapter and thus are not subject to its requirements. However, if a local government employee or an employee of a local school system also serves in another covered person position, he or she will be required to comply with all applicable provisions of the new ethics chapter at all times and in all situations, even when not acting in a covered person capacity (see Question 3).

**6. What local judicial officials are covered under the new ethics law?**

Clerks of court and district attorneys are covered persons, as are all other elected judicial officials. As magistrates are not considered judicial officials for purposes of the chapter, they are not covered.<sup>6</sup>

**7. What are statements of economic interest, and do local government officials have to file them?**

Most covered persons are required to file statements disclosing their personal and business financial interests. The purpose of this requirement is to help identify and avoid potential conflicts of interest between the covered person's private interests and public duties.

As local government officials (both elected and appointed) are not covered under the new ethics chapter, they are not required to file statements of economic interest. However, a local elected or appointed official who also serves in certain covered positions will be required to file a statement of economic interest. Positions that local government officials are likely to serve in—and that require them to file statements of economic interest—include, but are not limited to, voting membership on of a nonadvisory state board, community college board of trustees, or university board of trustees or an appointment as the chief deputy or chief administrative assistant to a state constitutional officer or cabinet secretary.<sup>7</sup>

6. G.S. 138A-3(19).

7. G.S. 138A-22. Individuals required to file statements of economic interest should consult their employing or appointing entity or the State Ethics

**8. How can I determine exactly who is covered under the new ethics law?**

Some of the public officials covered under the chapter, such as the governor, legislators, and judges, are easy to identify by virtue of their office. Others, such as confidential assistants and secretaries to state officials, are not so easily identified. To ensure that the public (and those covered persons themselves) are fully aware of which public officials are covered, the chapter requires the State Ethics Commission to publish, at least quarterly, a list of all covered persons and legislative employees. The list is published on the commission's website.<sup>8</sup>

**Entities Covered under the Chapter**

As noted earlier, some individuals are covered under the chapter by virtue of their service on various boards or other bodies. The next group of questions examines those entities.

**9. Are units of local government covered?**

No. Units of local government, in and of themselves, are not covered under G.S. Ch. 138A. As discussed above, certain local officials and employees may be covered in certain circumstances, such as when serving as voting members of nonadvisory state boards or commissions.

**10. What boards and commissions are covered?**

The chapter applies to any state board, commission, council, committee, task force, authority, or other similar public body created by statute or executive order. Boards that serve only in advisory capacities are not covered. The voting members of all covered boards are subject to the requirements of the chapter, including those who serve ex officio and those who serve by executive, legislative, or judicial appointment.<sup>9</sup>

A number of state boards with jurisdiction over matters affecting local governments are covered under the new chapter. Examples include (but are not limited to) the Local Government Commission, Property Tax Commission, State Board of Transportation, Coastal Resources Commission, Environmental Management Commission, Marine

Commission about the specific requirements of these provisions. See Article 3 of G.S. Ch. 138A.

8. G.S. 138A-11. The State Ethics Commission can be contacted at 919.807.4620; its website is [www.ethicscommission.nc.gov](http://www.ethicscommission.nc.gov).

9. G.S. 138A-3(1) and -3(30)(i).

Fisheries Commission, State Board of Elections, Governor's Crime Commission, Fire and Rescue Commission, Local Government Employees' Retirement System board, Parks and Recreation Authority, Sheriffs' Education and Training Standards Commission, Social Services Commission, Soil and Water Conservation Commission, and the Clean Water Management Trust Fund board of directors.

#### **11. Are committees within state agencies covered?**

No. Internal committees of state agencies that are composed entirely of agency staff are not covered under the ethics chapter unless the committee is legally vested with authority that is more than merely advisory, is established by statute or executive order, or is formally appointed by legislative, executive, or judicial authority.

#### **12. Are local government boards covered?**

Generally, no. Local government boards, such as boards of county commissioners, city councils, boards of education and their members are not covered by the ethics chapter. There are, however, some local and regional boards for which the answer is less clear.

The chapter applies to nonadvisory state boards but does not define a "state board." It appears that legislators intended the law to cover nonadvisory boards that have statewide jurisdictions or perform functions that are statewide in nature but not boards that essentially operate at the local level. This interpretation would appear to eliminate most local government bodies.

However, some boards commonly thought of as local boards also have a direct connection to the state. They may have been established by statute, or their members may be appointed or approved by the state, or they function as the local branch of a statewide system. Local boards of health, social services, area mental health, alcoholic beverage control, and elections, as well as the governing bodies of public hospitals, have such state connections. *It is currently unclear whether G.S. Ch. 138A applies to this category of local boards.*

For example, the State Board of Elections, which oversees elections matters statewide and exercises statewide jurisdiction, is covered under the chapter, whereas county boards of elections are apparently not covered because their jurisdictions are limited to the county level. However, because their board members are appointed by a state official and they carry out specific functions directly connected with statewide activities (elections), the chapter may apply to them after all. The State Ethics Commission, which is

authorized to adopt rules implementing the Act and to issue advisory opinions on questions concerning its application, may provide clarification on this issue if the General Assembly does not.

It is also unclear whether, and how, G.S. Ch. 138A applies to boards and commissions that operate at a regional level, such as economic development commissions (or partnerships),<sup>10</sup> councils of government, mental health local management entities, or other regional entities created by statute or executive order. The State Ethics Commission may provide clarification on this question as well.

What *is* clear is that strictly local boards that operate solely at the local level and have no direct connection to state functions or state officials are not covered under the chapter. Examples of such boards include zoning boards of adjustment, boards of equalization and review, local housing authorities, and entities established by the General Assembly through local acts specific to individual cities and counties (e.g., airport authorities, tourism boards, convention bureaus, beautification districts, and historic districts). Also not covered are any boards, commissions, or task forces established directly by county or municipal governments.

#### **13. What about community college boards of trustees?**

While the boards of trustees of community colleges are sometimes thought of as local boards because of the direct relationship between counties and community colleges, these boards are specifically covered under the chapter, and all voting members of these boards are public servants subject to the law.<sup>11</sup>

#### **14. How can I find out which boards are covered?**

The State Ethics Commission is required to designate the specific state boards covered under the the chapter and to publish, at least annually, a list of covered boards. The list is published on the commission's website.<sup>12</sup>

### **General Requirements and Prohibitions**

After identifying the persons and positions subject to Chapter 138A, local officials evaluating its

10. Regional economic development commissions were covered under Executive Order No. 1.

11. G.S. 138A-3(30)(k).

12. G.S. 138A-11. The State Ethics Commission can be contacted at 919.807.4620; its website is [www.ethicscommission.nc.gov](http://www.ethicscommission.nc.gov).

application to their own governments will need to examine what requirements and restrictions the chapter mandates.

#### 15. What are covered persons required to do?

Covered persons (legislators, judicial officers, and public servants) and legislative employees are required, in most instances, to do some or all of the following:

- publicly disclose personal economic interests
- participate in ethics education programs and training
- take an active role in furthering ethics in public service and ensuring compliance with the ethics law
- determine whether a conflict of interest exists before taking official action
- remove any disqualifying conflict of interest found or resign his or her position

Not every requirement listed above will apply in every instance to all covered persons and legislative employees. Individuals who are covered persons or legislative employees should consult G.S. Ch. 138A or the State Ethics Commission to obtain more specific information about their obligations under the law.

#### 16. What are covered persons prohibited from doing?

Covered persons (legislators, judicial officers, and public servants) and legislative employees are prohibited, in most instances, from doing some or all of the following:

- using or allowing others to use their public position for private gain or in private advertising<sup>13</sup>
- accepting certain gifts from certain individuals and entities<sup>14</sup>
- receiving outside compensation for performing their official duties
- using nonpublic information for personal financial gain
- participating in official actions in which they have a personal financial interest
- employing and/or supervising family members

13. See Question 25 for further discussion of this prohibition.

14. See Questions 17–24 for further discussion of gifts and event participation.

Not every prohibition listed above will apply in every instance to all covered persons and legislative employees, but all of the above prohibitions do apply to public servants. Individuals who are covered persons or legislative employees should consult G.S. Ch. 138A or the State Ethics Commission to obtain more specific information about the prohibitions that apply to them.

### Gifts and Events

Although they govern only one of the activities governed by G.S. Ch. 138A, the provisions regulating gifts raise some of the more complex questions about the new law. They thus warrant a detailed review.

#### 17. What are gifts?

For purposes of Chapter 138A, a “gift” is “anything of monetary value given or received without valuable consideration” by or from any of the following people:<sup>15</sup>

- a lobbyist
- a lobbyist principal
- a person whom a public servant knows or has reason to know
  - is doing or seeking to do business of any kind with the public servant’s employing entity,
  - is engaged in activities that are regulated or controlled by the public servant’s employing entity, *or*
  - has financial interests that may be substantially and materially affected, in a manner distinguishable from the public generally, by the performance or nonperformance of the public servant’s official duties.

The three final categories of persons are referred to by the State Ethics Commission as “interested persons.”

#### 18. What limitations apply to giving and receiving gifts?

There are a number of restrictions on the giving and receiving of gifts under the new law. Some of these restrictions vary according to who is giving and who is receiving the gift.

- Public servants, legislators, and legislative employees are prohibited from knowingly accepting gifts from lobbyists or their

15. G.S. 138A-3(15).

principals.<sup>16</sup> There is no de minimis exception to this prohibition; it is a complete ban. (This restriction does not apply to judicial officers.)

- Public servants are prohibited from knowingly accepting gifts from persons they know, or have reason to know, have a business, regulatory, or material financial interest in the official duties of the public servant or the public servant's employing entity. The State Ethics Commission refers to such persons as "interested persons."<sup>17</sup> (This restriction does not apply to legislators, legislative employees, or judicial officers.)
- Covered persons and legislative employees are prohibited from knowingly (either directly or indirectly) soliciting or accepting anything of value in return for being influenced in the discharge of their official duties (i.e., a quid pro quo gift). This prohibition is broader than the specific gift bans described above and is not limited to gifts from lobbyists, their principals, or interested persons.
- Covered persons are prohibited from soliciting gifts for charitable purposes from state employees they supervise. Generic written solicitations distributed to an entire class of employees (e.g., for the State Employees Combined Campaign.) are exempt from this prohibition. (This restriction does not apply to legislative employees.)
- Covered persons and legislative employees are prohibited from accepting honoraria (defined as "payment for services for which fees are not legally or traditionally required"<sup>18</sup>) from outside entities if the covered person or legislative employee (1) receives reimbursement for expenses associated with the function for which the honorarium would be given, (2) attends the function on work time, or (3) attends the event as part of his or her official duties. Payment of actual expenses incurred in conjunction with a function is allowed.<sup>19</sup>

16. See Question 33 for definitions of "lobbyist" and "lobbyist principal."

17. See Question 17 and G.S. 138A-32(d) for a complete definition of persons in this category.

18. G.S. 138A-3(16).

19. G.S. 138A-32 (e)(3).

**19. Are local governments persons for the purpose of the prohibition against a public servant accepting a gift from someone who has a business, regulatory, or material financial interest (an interested person) in the public servant's official duties or the public servant's employing entity?**

As discussed immediately above, the interested person prohibition applies to a public servant accepting a gift from a person who has any one of the three interests described in Question 17 (business, regulatory, or financial). The chapter defines a "person" as any individual, firm, partnership, committee, association, corporation, business, or any other organization or group of persons acting together.<sup>20</sup> Given the breadth of this definition, it could include units of local government, and it is expected that the State Ethics Commission, which is empowered to adopt rules interpreting the chapter, will determine that units of local government are persons for purposes of this prohibition.<sup>21</sup> Under this interpretation, a unit of local government cannot give a gift paid for with public funds to a public servant with whom it has a business, regulatory, or material financial interest in the public servant's official duties or to the public servant's employing entity.

This determination has significant implications for local governments' interactions with public servants, including officials in the executive branch and voting members of nonadvisory state boards. For example, when these state boards meet in locations outside their normal meeting places, it is not uncommon for the local government where the meeting is held to host a reception for board members. If the board in question has jurisdiction over a matter in which the local government has a business, regulatory, or financial interest (such as a pending grant request or permit application), the local government would be prohibited from spending public funds on the reception. Similarly, local governments could not spend public funds on activities such as taking members of the Local Government Commission to lunch, or presenting a gift to members of the Clean Water Management Trust Fund Board of Directors if the local government was seeking a grant from the Trust Fund.

There are some exceptions to this prohibition, which are discussed in Question 20.

20. G.S. 138A-3(27).

21. Formal opinions of the State Ethics Commission are available on the commission's website: [www.ethicscommission.nc.gov](http://www.ethicscommission.nc.gov).

As this prohibition applies only to gifts to public servants, it would not prevent local governments from presenting gifts to legislators, legislative employees, or judicial officials

**20. Are there any exceptions to the restrictions on gifts?**

Yes. There are two general categories of exemptions. First, the chapter specifically exempts certain items from the definition of a gift. Second, some types of gifts that would otherwise be restricted are exempted in certain clearly defined situations. The following items are exempt from the definition of a gift:

- anything for which fair market value or face value is paid by the covered person or legislative employee
- commercially available loans made on the same terms as those available to the general public (and not made for the purpose of lobbying)
- contracts and commercial relationships made in the normal course of business (and not made for the purpose of lobbying)
- academic and athletic scholarships awarded on the same criteria as those applied to all applicants
- lawfully made and received political campaign contributions<sup>22</sup>

G.S. Ch. 138A also exempts from restriction certain gifts that would otherwise be prohibited when they are given in very specific situations. These exemptions apply to some gifts given by lobbyists and their principals to covered persons and legislative employees and to some gifts given by interested persons to public servants.<sup>23</sup> Examples of these exceptions include

- food and beverage served at a public event (as "public event" is specifically defined in G.S. 138A-3(29))
- informational materials relevant to the duties of the covered person or legislative employee
- reasonable actual expenses connected with attendance at an educational meeting
- A plaque or similar nonmonetary memento recognizing service
- certain gifts and expenses associated with industrial recruitment, promotion of travel and tourism, or international trade

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22. G.S. 138A-3(15).

23. See Question 17 and G.S. 138A-32(d) for a complete definition of persons in this category.

Because these exemptions are very specific and unique to lobbyists, lobbyist principals, and interested persons, individuals and entities that fall into one of these categories, *including local governments that find themselves having an interested person relationship with a public servant*, should consult G.S. Ch. 138A or the State Ethics Commission to ensure full compliance with these provisions.<sup>24</sup>

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24. G.S. 138A-32(e).

Restrictions on Gifts to Covered Persons and Legislative Employees				
Recipient	Quid pro quo	Gift from lobbyist/ principal	Gift from interested person	Honorarium
Legislators	Prohibited	Prohibited	Prohibited	Prohibited
Judicial officers	Prohibited	Not applicable	Not applicable	Prohibited
Public servants	Prohibited	Prohibited	Prohibited	Prohibited
Legislative employees	Prohibited	Prohibited	Not applicable	Prohibited

Source: G.S. 138A-32.

**21. Is it legal for local governments to give legislators, legislative employees, or other covered persons gifts?**

Generally speaking, local governments may give gifts to covered persons and legislative employees<sup>25</sup> except when

- the local government has employed a contract lobbyist (and, as a result, has become a principal).
- the gift is offered as a quid pro quo.
- the gift is a prohibited honorarium.
- the local government has an interested person relationship with a public servant.

To ensure full compliance with the new law, it is important to further examine these prohibitions as they apply to local governments. (See summary table of gift restrictions above.)

- *Lobbyist gift prohibition.* The complete prohibition on gifts from lobbyists and their principals will not usually apply to local governments, because local government officials and employees are not considered lobbyists under the lobbying act.<sup>26</sup> However, if a local government contracts with a lobbyist who is not an employee of the local government, the local government becomes that lobbyist's principal and the prohibition will apply to gifts given by the local government to legislators, legislative employees, and public servants.<sup>27</sup> In this case, the local government cannot expend public funds on gifts to anyone covered under the new law except in very specific

circumstances that are clearly defined in G.S. Ch. 138A.<sup>28</sup>

- *Quid pro quo prohibition.* This prohibition applies to covered persons and legislative employees irrespective of who is giving the gift. Thus, a local government official or employee cannot offer anything of value to covered persons and legislative employees in return for their influence in the performance of their official duties.
- *Honorarium prohibition.* This prohibition applies to covered persons and legislative employees regardless of who offers the honorarium. Local governments may not offer an honorarium to a covered person or legislative employee but may reimburse such an individual for actual expenses incurred by participating in a function.
- *Interested person prohibition.* As discussed in Question 19, the State Ethics Commission is expected to determine that local governments are persons for purposes of the interested persons prohibition. As such, they will be prohibited from giving a gift paid for with public funds to a public servant with whose department or agency the local government has a business, regulatory, or material financial interest. (*Note:* This prohibition applies only to gifts given to public servants and not to gifts given to legislators, legislative employees, or judicial officers.) Local governments should consult with the State Ethics Commission before giving gifts to public servants if the relationship between the local government and the public servant or the public servant's employing entity appears to fall into one of the three interested persons categories.

25. See Question 1 for definitions of "covered persons" and "legislative employees."

26. See Questions 36-38.

27. See Question 39 for further discussion of local governments as principals.

28. G.S. 138A-32(e).

**22. What about functions such as receptions hosted by multiple units of local government within our region? May we still invite our legislative delegation, other covered persons, and legislative employees to these functions?**

Generally, yes. However, if one of the units of government co-hosting the function has retained a contract lobbyist (and as a result has become that lobbyist's principal<sup>29</sup>), that unit of government cannot contribute public funds to the costs of the function unless the event meets the definition of a public event under the ethics chapter.<sup>30</sup> The same holds true if public servants are invited to attend the event and one of the local government co-hosts has an interested person relationship with that public servant. To ensure compliance with these provisions, units of government in this situation are advised to consult Chapter 138A and the State Ethics Commission before expending funds on such an event.

**23. Is it legal for our local government to take our legislator or members of our delegation (or other covered persons and legislative employees) out to lunch or dinner?**

Generally, yes. Under the ethics law, paying for a meal such as lunch or dinner is no different than giving a gift, which local governments are generally not prohibited from doing. However, if the local government has retained a contract lobbyist, and is thus a principal, it is generally prohibited (with certain narrow exceptions described in Question 20) from spending public funds on meals for covered persons or legislative employees—just as it would be generally prohibited from giving other types of gifts to those individuals.

Additionally, local governments having an interested person relationship with a public servant would be prohibited from using public funds to pay for the public servant's meal unless the meal fell into one of the narrow exceptions described in Question 20.

**24. If our local government invites our legislator or other covered persons to speak at a function in our community, may we give that official a thank you gift? If food is served, can we serve it to our legislator and other covered persons who are attending?**

29. See Questions 21 and 39.

30. A "public event" is very specifically defined in the State Government Ethics Act. For a complete definition, see G.S. 138A-3(29). For further discussion of local governments as principals, see Question 39.

Generally, yes. Like buying a legislator or other covered person or legislative employee lunch or supper (see Question 23), providing food at a function that any one of these individuals attends is generally not prohibited. Similarly, the local government may give the guest a gift to thank them for their participation in the function.

However, as discussed in Questions 22 and 23, if the local government has retained a lobbyist, and thus become a lobbyist's principal, the local government is generally prohibited from spending its public funds on gifts to covered persons and legislative employees, and food may only be served to covered persons and legislative employees if the function falls within the definition of a public event.<sup>31</sup> Similarly, if a public servant is invited to the event and the local government has an interested person relationship with that public servant, the local government is prohibited from using public funds to give a thank you gift or to provide food to the public servant unless the event meets the public event definition or falls under one of the other exceptions to the interested person gift ban discussed in Question 20.

While thank you gifts for speakers are allowed (except as noted above), "honoraria"—defined as "payment for services for which fees are not legally or traditionally required"<sup>32</sup>—are prohibited if, as noted in Question 18, the covered person or legislative employee (1) receives reimbursement for the expenses associated with attending the function, (2) attends the function on work time, or (3) attends the event as part of his or her official duties.<sup>33</sup> Payment of actual expenses incurred in conjunction with the function is allowed

**25. Is it legal for our legislator or another covered person to officially support or endorse community activities and events? What if those events are fund-raisers for local projects or charities?**

Yes, with some limitations. G.S. Ch.138A prohibits a covered person from using (or allowing to be used) his or her "public position in nongovernmental advertising that advances the private interests of the covered person or others."<sup>34</sup> As a local government-sponsored event, such as a town festival, would not constitute "nongovernmental advertising for private gain," use of the covered person's name in his or her

31. A "public event" is very specifically defined in G.S. 138A-3(29).

32. G.S. 138A-3(16).

33. G.S. 138A-32(h).

34. G.S. 138A-31(b).

public position promoting the event would not be prohibited.

Charitable solicitation on behalf of a nonprofit entity is specifically exempted from the law's advertising prohibition, so use of a covered person's name in his or her official capacity in support of a nonprofit charity, such as a fund drive for a local arts council, is still allowed.

Even though covered persons may promote local and community events and assist in fund-raising efforts for nonprofit entities in their official capacities, one limitation still applies in these situations. A covered person cannot use (or permit to be used) his or her name, voice, or image in most forms of advertising or public service announcements that are paid for with state funds.<sup>35</sup> This prohibition applies to any use of the covered person's name, voice, or image, regardless of whether it is in his or her official capacity. A local government or local nonprofit organization that uses a covered person's name, voice, or image in advertising or in a public service announcement promoting a local project, event, or charity should be mindful of this restriction and should avoid using state funds to pay for the advertising.

## Enforcement and Penalties

### 26. Whom do we contact if we have questions about the new ethics requirements?

The State Ethics Commission is charged with the authority and responsibility to implement the new ethics law and may adopt procedures and guidelines for doing so.

The commission may also render advisory opinions on questions involving the meaning and application of the G.S. Ch. 138A. Such opinions are only applicable prospectively, not retroactively. Requests for advisory opinions and opinions issued by the commission are confidential and not a matter of public record. At least once a year the commission must publish its advisory opinions, removing any information that could identify the persons requesting an opinion.<sup>36</sup>

35. The one exception to this prohibition is in a declared state or national emergency when the announcement or advertising is necessary to the covered person's official duties. G.S. 138A-31(c).

36. G.S. 138A-10, -13.

### 27. Who enforces the new ethics requirements?

The State Ethics Commission is empowered to conduct inquiries about alleged violations of the chapter and may handle inquiries in a number of ways detailed in G.S. 138A-12.

### 28. What are the penalties for violations?

Violations of the ethics law by any covered person or legislative employee are grounds for disciplinary action and may constitute misfeasance, malfeasance, or nonfeasance of office. The specific actions taken against the covered person or legislative employee for violating the Act would depend on the offender's position. For example, a violation by a public servant serving on a state board may result in removal from that board.

If a covered person or legislative employee has relied on a written advisory opinion issued by the State Ethics Commission on a specific matter, he or she is immune from both investigation by the commission and any applicable adverse action under the chapter relating to that specific matter.<sup>37</sup>

G.S. Ch. 138A also imposes criminal penalties for violations of financial interest disclosure requirements and for lying under oath during investigatory proceedings of the State Ethics Commission. If the conduct in question also constitutes a violation of some other law (or laws) that carries criminal penalties, the ethics law provisions do not affect the power of the state to prosecute the separate violations.<sup>38</sup>

### 29. Are other statutes governing ethical matters and conflicts of interest still in effect?

Yes. The new ethics chapter does not supersede existing statutes that govern and prohibit certain conduct by government officials. For example, the existing prohibitions against bribes (G.S. 14-217, -218), contracting for one's own benefit (G.S. 14-234), accepting gifts and favors from contractors and others (G.S. 133-32), and misuse of confidential information (G.S. 14-234.1) are all still in effect. Violations of these statutes all carry criminal penalties. Rules relating to conflicts of interest that may restrict voting by members of a local governing board and other bodies (e.g., G.S. 153A-43 and 160A-75) are also unaffected by the new law.

37. G.S. 138A-13.

38. G.S. 138A-45.

## Lobbying—Chapter 120C

The new lobbying law imposes new and stronger restrictions and regulations on various forms of activities and communications with public officials. The earlier lobbying statute governed only lobbyists' communications with members of the General Assembly. The new G.S. Ch. 120C not only expands the definition of lobbying but also addresses the various contexts in which the lobbying occurs. The law's requirements and prohibitions now govern interactions with certain officials and personnel in all three branches of government. Although its provisions are generally not applicable to local governments, some of them will affect the manner in which local governments have until now conducted business with certain state officials.

### 30. What is lobbying?

G.S. Chapter 120C defines "lobbying" as influencing or attempting to influence the legislative or executive actions of an individual or organization. Examples of legislative action include the preparation, consideration, and action on legislation by state legislators and their employees. Examples of executive action include the development and adoption of policies, regulations, or rules.

Activities that constitute lobbying fall into two main categories: direct lobbying and indirect or goodwill lobbying.

"Direct lobbying" involves specific communications about legislative or executive actions with certain officials and personnel or their immediate families. Such communications can include face-to-face conversations, letters, emails, telephone calls, and faxes.

"Indirect" or "goodwill lobbying" involves activities or communications intended to build relationships with certain officials and personnel for the purpose of influencing current or future legislative or executive actions.

Communications or activities that are part of business, civic, religious, fraternal, personal, or commercial relationships not connected with legislative or executive action are not categorized as lobbying.<sup>39</sup>

### 31. What are legislative or executive actions?

For an activity or communication to be considered lobbying, it must influence or attempt to influence legislative or executive action. If the activity or communication is directed at something other than legislative or executive action, then it is not lobbying.

39. G.S. 120C-100(9).

"Legislative action" is defined in the law as the preparation, research, drafting, introduction, consideration, modification, amendment, approval, passage, enactment, tabling, postponement, defeat, or rejection of a bill, resolution, amendment, motion, report, nomination, appointment or other matter by a legislator or legislative employee acting or purporting to act in an official capacity.<sup>40</sup>

Whether or not the matter is identified by an official title, general title, or other specific reference is immaterial for purposes of the lobbying law. The definition of legislative action also includes the governor's consideration of a proposed law enacted by the General Assembly.

"Executive action" is defined in the law as

The preparation, research, drafting, development, consideration, modification, amendment, adoption, approval, tabling, postponement, defeat, or rejection of a policy, guideline, request for proposal, procedure, regulation, or rule by a public servant purporting to act in an official capacity.<sup>41</sup>

Exempted from the definition of executive action are communications with public servants in the following situations:

- judicial, quasi-judicial, and contested case hearing proceedings under North Carolina's Administrative Procedure Act (G.S. Chapter 150B)
- applications for permits, licenses, eligibility determinations, or certifications
- inquiries about benefits, claims, rights, obligations, duties, entitlements, payments, or penalties
- inquiries about or responses to requests for proposals
- ratemaking
- internal administrative and ministerial functions
- public comments made at an open meeting or submitted in writing in response to requests for public comment (as long as no reportable expenditure is involved)<sup>42</sup>

40. G.S. 120C-100(a)(5).

41. G.S. 120C-100(a)(3).

42. *Id.* A "reportable expenditure" is "any advance, contribution, conveyance, deposit, distribution, payment, gift, retainer, fee, salary, honorarium, reimbursement, loan,

**32. Who can be lobbied?**

Individuals and organizations communicate regularly with public officials about all manner of public business, usually with the goal of attempting to influence the public officials' opinions or actions on particular matters. The restrictions and regulations of the lobbying law are triggered only when these communications are made (either directly or through goodwill activities as discussed above) to certain categories of public officials called designated individuals. If the communication is with someone who is not a designated individual, the communication is not considered lobbying for purposes of the law. "Designated individuals" are defined as

- legislators,
- legislative employees, and
- public servants as defined under the ethics law.<sup>43</sup>

The category of designated individuals includes not only persons currently serving in any of the above positions, but also persons nominated for appointment to these positions, candidates for elective offices, and persons who have won election but have not yet assumed office.

The definition of a public servant does not include judicial officers but does include certain judicial employees.

**33. Who is a lobbyist?**

A "lobbyist" is a person who is employed by another person, represents another person for compensation but is not directly employed by that person, or works under contract for compensation for the purpose of lobbying. Employees of businesses and organizations who spend less than 5 percent of their work time during a thirty-day period engaged in lobbying activities are not considered lobbyists.<sup>44</sup> The lobbying law treats employees who lobby for legislative action on behalf of state agencies somewhat differently.<sup>45</sup>

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pledge, or thing of value greater than ten dollars (\$10.00) per designated individual per single calendar day or a contract, agreement, promise, or other obligation whether or not legally enforceable that directly or indirectly is made to, at the request of, for the benefit of, or on the behalf of a designated individual or that individual's immediate family member." G.S. 120C-100(a)(12).

43. G.S. 120C-100(a)(2). See Question 1 for a complete list of public servants.

44. G.S. 120C-100(a)(10).

45. Article 5 of G.S. 120C.

The person or entity that employs or retains a lobbyist is referred to as that lobbyist's "principal."<sup>46</sup>

**34. Do all communications with a designated individual constitute lobbying that is subject to the provisions of the lobbying law?**

No. Generally, the provisions of the lobbying chapter only apply when the communication

- constitutes lobbying (i.e., is directly and/or through good will intended to influence legislative or executive action),
- is directed to a designated individual, and
- comes from a lobbyist.

Only if the communication or activity satisfies all three parts of this definition is it subject to the provisions of the lobbying law.

In addition, the following persons and entities are specifically exempted from the requirements of G.S. Chapter 120C:<sup>47</sup>

- individuals expressing their personal opinion
- persons appearing before committees, boards, and commissions at the group's request
- elected or appointed officials and employees of units of state and local government appearing solely in connection with matters pertaining to their own offices and public duties
- persons performing professional services: for example, drafting bills or advising and rendering opinions to clients or to designated individuals on behalf of clients about the effect of proposed or pending legislative or executive action. Such persons are exempt as long as they only render professional services and do not attempt to influence that action.
- members of the news media when engaged in reporting
- designated individuals when acting in their official capacity
- persons merely responding to inquiries from designated individuals
- political committees and their employees and contractors

**35. What requirements and restrictions apply to lobbyists?**

Generally, lobbyists are required to register with the Secretary of State's Office, report lobbying

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46. G.S. 120C-100(a)(11).

47. G.S. 120C-700.

expenditures, and identify themselves as lobbyists when engaged in lobbying. (Lobbyists' principals are also required to register with the Secretary of State's Office and comply with certain reporting requirements.) They may also participate in lobbying education programs approved by the State Ethics Commission.

Lobbyists are subject to a number of restrictions and prohibitions, including bans on making, soliciting, or transferring campaign contributions to state elected officials and legislators and on serving as campaign treasurers in campaigns for state office. Lobbyists and their principals are also prohibited from giving gifts to designated individuals, with certain very limited exceptions.

**36. Are local government officials subject to the lobbying law?**

In general, no. A duly elected or appointed official of a county, municipality, school district, or other governmental agency is exempt from the lobbying chapter requirements when engaged in communications with designated legislative and executive officials and staff solely in connection with matters pertaining to their own offices and public duties. Notwithstanding this general exemption, local officials (and some local employees) may be subject to a few of the new law's expenditure-reporting requirements.<sup>48</sup>

However, a local government official who engages in lobbying activities not connected to his or her office or duties may be required to comply with the lobbying law with respect to those nongovernment-related lobbying activities.

**37. Are local government personnel subject to the lobbying law?**

Generally, no. Like local elected and appointed officials, employees of a city, county, school district, or other local government entity are specifically exempted from the requirements of the lobbying chapter when engaged in communications with designated persons solely in connection with matters pertaining to their position and public duties.<sup>49</sup> This exemption applies to all local government employees, *including those whose primary job duties are lobbying on behalf of their local government employer*. Even with this broad exemption, however, a few expenditure-reporting requirements may apply to local government lobbying activities.

48. G.S. 120C-700(3).

49. *Id.* See also Question 44.

Moreover, a local government employee who engages in lobbying activities not connected with his or her official duties may be required to comply with other requirements of the lobbying chapter with respect to those nongovernment-related lobbying activities.

**38. Is our local government itself subject to the lobbying law?**

Generally, no. Because units of local government act through their elected or appointed officials and employees, who are generally exempt from the lobbying law, the law does not apply to the local government. This means that local officials and employees may spend public funds on lobbying activities and, in most instances, may give gifts;<sup>50</sup> they are not subject to the expenditure restrictions and reporting requirements imposed on lobbyists and their principals, except for those identified below in Question 44.

However, if a local government retains a contract lobbyist who is not its employee, it will be subject to the lobbying law as a principal, as discussed in Question 39.

**39. What if our local government retains a lobbyist who is an independent contractor and is not our employee? Is he or she a lobbyist? Are we a principal?**

Yes. G.S. Chapter 120C only exempts local government officials and employees from its requirements. If a local government retains an individual or firm on an independent contractor basis to lobby on its behalf, that lobbyist is not an employee of the local government and is therefore subject to the requirements of the lobbying law.

Perhaps more significant from the local government's standpoint is that hiring a contract lobbyist makes the local government a principal for purposes of both the lobbying law (G.S. Ch. 120C) and the ethics law (G.S. Ch. 138A) and therefore makes it subject to all their applicable requirements. For example, the local government must comply with principal registration and reporting requirements under the lobbying law, and it is subject to the ethics law's prohibition against giving gifts to legislators, legislative employees, and public servants. A local government that is a lobbyist's principal cannot

50. As discussed in Questions 19, 20, and 21, local governments are subject to some restrictions on gift-giving under G.S. 138A-32.

spend its public funds on any prohibited gifts to covered persons and legislative employees.<sup>51</sup>

Local government officials who hire a contract lobbyist need to become fully familiar with all specific requirements and restrictions in both the lobbying and ethics laws to ensure full compliance with these laws. They can obtain additional information about registration, reporting requirements, and other pertinent information by contacting the State Ethics Commission and the North Carolina Secretary of State's Office.

**40. What about other independent contractors or firms retained by our local government? Are they required to register as lobbyists?**

They may be, if they act on behalf of the local government in a manner that constitutes lobbying and are paid for doing so. As discussed in Question 39, the local government exemption only applies to local elected and appointed officials and employees. Persons retained or working under contract with a local government are not considered officials or employees of that local government and are not exempt from the lobbying statute. If they engage in lobbying activities and are compensated for those activities, they will be subject to the lobbying requirements, even if these activities are done on behalf of the local government.

For example, a local government seeking state funding for a new wastewater treatment facility might contract with an engineering design firm. During the course of its work, engineers with the firm might communicate with the local government's legislative delegation about costs associated with the project. If the engineers merely provide information or respond to inquiries from the legislators, their communications do not constitute lobbying (see Question 34). However, if the engineers communicate directly to or engage in goodwill activities with the delegation members to advocate for the desired state funding, their communications and activities may constitute lobbying that is subject to the requirements of G.S. Ch. 120C. In that case, the local government on whose behalf the engineer is lobbying is considered a lobbyist's principal and becomes subject to the requirements of the lobbying law.<sup>52</sup>

51. See Question 18 for further discussion of gift restrictions.

52. See Question 39 for further discussion of local governments as principals.

**41. What about our city or county attorney who works for us on retainer? Is he or she required to register as a lobbyist?**

As discussed in Questions 39 and 40 above, the local government exemption is specific to local elected and appointed officials and employees. Many units of local government do not employ full-time attorneys but instead retain a private attorney or law firm to serve as their legal advisor. These private attorneys are not normally considered employees of the government unit and thus are not clearly included in the exemption for local government employees. However, the State Ethics Commission is expected to determine that retained attorneys representing local governments are officials for purposes of Chapter 120C and thus would be covered under the local government exemption to lobbying regulations.

Additionally, a retained attorney who merely provides information, responds to inquiries, or advises the local government client is also exempt from the law's requirements.<sup>53</sup>

**42. What if our local government is a member of an association or organization that has hired a lobbyist? Does that make our local government a lobbyist principal?**

No. If an association or other organization has employed or retained a lobbyist, the principal is the association or organization itself, not individual members or entities. Members of the organization do not become principals simply because of their membership in the group.

For example, both the North Carolina League of Municipalities and the North Carolina Association of County Commissioners employ registered lobbyists and thus are principals. However, the cities and counties that are members of these two associations are not principals solely because they hold memberships in one of these associations.<sup>54</sup>

**43. If local government officials and employees communicate with legislators, legislative employees, and public servants about matters not related to their local government? Is that lobbying?**

It could be, depending on the circumstances and nature of the communication. If a person is merely expressing a personal opinion, stating facts or recommendations, appearing before a legislative or executive committee at the request of that committee, responding to inquiries, rendering professional

53. G.S. 120C-700.

54. G.S. 120C-110(11).

services in connection with proposed legislative or executive actions, rendering opinions to clients, or engaging in any of the other exempt activities listed in G.S. 120C-700, then that person is not subject to the lobbying law.<sup>55</sup> However, if the local government official or employee receives compensation or some economic consideration (besides reimbursement for actual travel and subsistence) from a nongovernment-related entity or group and carries out lobbying activities on its behalf, he or she will be subject to the requirements of the lobbying law.

**44. Do local government officials and employees have to comply with any lobbying reporting requirements?**

Generally speaking, no. Since local government officials and employees are exempt from G.S. Ch. 120C when lobbying in their official capacities on behalf of their units of government, they are not subject to the reporting requirements for lobbyists and their principals. If a local government has retained a contract lobbyist, however, it is subject to the law's registration and reporting requirements.<sup>56</sup>

There are two situations that may subject a local government (or otherwise-exempt individual) to the lobbying law's reporting requirements, even if they have not hired a contract lobbyist and become a principal:

- If a local government spends more than \$200 lobbying a designated individual in a calendar quarter, the local government must report those expenditures.<sup>57</sup>
- If a local government spends more than \$200 for a designated individual to attend a conference, meeting, or similar event (referred to as a "scholarship" under the chapter), the local government must report those expenditures.

In both instances, a report must be filed with the North Carolina Secretary of State's Office within ten business days after the end of the calendar-year quarter in which the expenditures occurred. The report must list the name of the group making the expenditure, the designated individual accepting the expenditure, the date(s) involved, and the fair market value of the expenditure.<sup>58</sup> The Secretary of State's

55. See Question 34.

56. See Question 39.

57. See Question 32 for the definition of "designated individual."

58. G.S. 120C-800(a).

Office is responsible for developing the forms to be used in reporting these kinds of expenditures.

**45. We have heard that the lobbying laws also contain solicitation-reporting requirements. Do those rules apply to local governments?**

No. The law establishes reporting requirements for certain mass communication and advocacy activities that are defined as "solicitation of others." Those who engage in solicitation activities are referred to in the chapter as "solicitors," and they are required to comply with certain registration and expenditure-reporting requirements. However, local governments' general exemption from most provisions of G.S. Ch. 120C includes exemption from the solicitation-reporting requirements.<sup>59</sup>

**46. Whom do we contact if we have a question about the new lobbying requirements?**

The State Ethics Commission is authorized to issue advisory opinions on specific questions involving the meaning and application of the lobbying law and to adopt any rules necessary to implement it. Registration and expenditure reports relating to lobbying should be filed with the Secretary of State's Office, which is authorized to adopt the rules and forms necessary to carry out the provisions of G.S. Ch. 120C. Individuals and entities that are or may be subject to the requirements of the law can contact the State Ethics Commission and the Secretary of State's Office for more information about the statute's requirements and restrictions.<sup>60</sup>

**47. Who enforces the new lobbying requirements and restrictions?**

Both the State Ethics Commission and the Secretary of State's Office have roles in enforcing Chapter 120C. The Secretary of State's Office is responsible for implementing the chapter's registration and expenditure-reporting requirements and may conduct investigations into alleged violations of reporting requirements. The State Ethics Commission is responsible for investigating alleged violations of all other provisions of the lobbying law.<sup>61</sup>

**48. What are the penalties for violations?**

A willful violation of G.S. Chapter 120C's registration requirements, prohibitions, or restrictions (including the ban on gifts) is punishable as a Class 1 misdemeanor. A lobbyist convicted of a violation of any of these rules is prohibited from lobbying in

59. G.S. 120C-100(13).

60. G.S. 120C-101, -102.

61. Article 6 of G.S. Ch. 120C.

North Carolina for two years from the date of conviction. The State Ethics Commission may also levy civil fines of up to \$5,000 per offense for any violation of these provisions of the lobbying law. In addition, the Secretary of State may levy civil fines of up to \$5,000 per violation for any violation of the chapter's expenditure reporting requirements.<sup>62</sup>

## Conclusion

Although primarily intended to govern the actions and conduct of state officials and those who lobby them, North Carolina's 2006 State Government Ethics Act does have certain implications for and applications to local governments. Historically, local government officials and personnel have enjoyed strong professional, even collegial, relationships with their state government counterparts. By and large, these relationships are not changed by the new ethics and lobbying laws. However, as outlined in this bulletin, certain activities that may have been a part of those relationships in the past are now (or may be) subject to regulation or even prohibition. Local government officials and employees are encouraged to become familiar with these changes to ensure that

their continued efforts on behalf of their citizens and communities are carried out in compliance with the new laws.

For more information about the new ethics and lobbying statutes and their implementation, readers should contact the State Ethics Commission ([www.ethicscommission.nc.gov](http://www.ethicscommission.nc.gov)) and the Office of the North Carolina Secretary of State ([www.secretary.state.nc.us/lobbyists/](http://www.secretary.state.nc.us/lobbyists/)).

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<sup>62</sup>. *Id.*