

TENNESSEE GOVERNMENT

Update

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

The Comprehensive Governmental Ethics Reform Act of 2006 Chapter 1, Public Acts Extraordinary Session 2006

The 2006 Extraordinary Session of the Tennessee General Assembly produced a 115-page public act that addresses ethical rules for lobbyists and legislators, campaign finance guidelines and the enforcement of both. A new state agency, the Tennessee Ethics Commission, was established. Miscellaneous legislative matters, such as open legislative committee meetings and a public record of committee votes, were also included in Chapter 1 of the Public Acts Extraordinary Session 2006.

Businesses have been interested in the rules that affect their relationship with state government, usually through their lobbyists. In this regard, the legislation contains rules that are somewhat complex. This paper will analyze Tennessee's law as amended by the 2006 Act and provide guidance to business interests with regard to lobbying activities and adjunct relationships with the executive and legislative branches of the government of Tennessee. This analysis does not include a discussion of the changes made to Tennessee's campaign finance regime.

Lobbyist

A lobbyist is a person who communicates with state government officials for pay to influence action by the executive or legislative branch. If a person is a lobbyist, that person and his or her employer must register with the newly-created Ethics Commission and file other reports. In addition, certain prohibitions are applicable to relationships with state officials.

Specifically, a lobbyist is "any person who engages in lobbying for compensation." T.C.A. § 3-6-301(17). "Lobby" means "to communicate, directly or indirectly, with any official in the legislative branch or executive branch for the purpose of influencing any legislative action or administrative action." T.C.A. § 3-6-301(15). "Compensation" is any payment, including reimbursement, but not including "the salary or reimbursement of an individual whose lobbying is incidental to such person's regular employment." T.C.A. §

3-6-301(7). A lobbyist may be an employee of the entity for which he or she lobbies or a non-employee agent. T.C.A. § 3-6-301(8).

"Administrative action" includes any "non-ministerial action of any official in the executive branch of government." However, the definition excludes "ordinary and routine permitting, licensing, or compliance decisions by an official of the executive branch of state government." T.C.A. § 3-6-301(1). "Legislative action" is broadly defined to mean any non-ministerial action or "non-action" on any legislative matter. T.C.A. § 3-6-301 (14).

Exempted from the definition of "lobby" and "lobbyist" are the following:

- i. One whose lobbying activities are *incidental* to his or her regular employment. T.C.A. § 3-6-301(7).
- ii. *Attorneys* appearing before a state official in a contested case, administrative proceeding or rulemaking procedure. T.C.A. § 3-6-301(15).
- iii. Employees of incumbent or prospective *state contractors* or vendors engaged in selling or marketing to the state. T.C.A. § 3-6-301(15). Such contractors and employees are, however, covered by the prohibitions applicable to lobbyists, including the prohibition against making campaign contributions to candidates for governor and the legislature (T.C.A. § 3-6-304) and giving gifts (T.C.A. § 3-6-305). In addition, in certain circumstances, state contractors and vendors are subject to the prohibitions of T.C.A. § 12-3-106 and to Executive Order No. 3 (February 3, 2003) relative to gifts to certain state officials.
- iv. Individuals communicating with the executive branch about *economic and community development grants*, loans and economic development incentive packages. T.C.A. § 3-6-301 (15).
- v. A person engaged with state officials in "ordinary and routine *permitting, licensing, or compliance decisions.*" T.C.A. § 3-6-301(1).

Employer of a Lobbyist

The employer of a lobbyist is any person or entity that employs or "otherwise arranges for a lobbyist to engage in lobbying *on behalf of the person or entity for compensation.*" T.C.A. § 3-6-301(8). A law firm or consulting firm that provides lobbying services to its clients or others is not the employer of a lobbyist. T.C.A. § 3-6-301(8) and (16). This new provision is apparently intended to prevent lobbyists from registering for their own firms rather than for the entity hiring the third-party lobbying firm.

Registration and Disclosure

Both the employer of a lobbyist and the lobbyist must file a registration statement with the Tennessee Ethics Commission within seven days after the person hired becomes a lobbyist; that is, within seven days after communicating with an official to influence governmental action. T.C.A. § 3-6-302(a).

The employer's registration statement must include the employer's name, address, telephone number and e-mail address. If the employer is a corporation or association, the names of the individuals "performing the functions of chief executive officer and chief financial officer" are also required. The employer's registration must also include the name and contact information of each lobbyist "authorized to represent the employer." In addition, in the registration statement, the employer of the lobbyist must verify "delivery [to the employer] by such lobbyist, of the commission's manual for lobbyists and employers of lobbyists." T.C.A. § 3-6-302(b)(1).

The lobbyist's registration must include his or her contact information, and, within thirty days of registration, a "current photographic portrait." The registration also must specify the subject matters to be lobbied for the employer of the lobbyist, which should be indicated by using the "general categories listed by the Ethics Commission." T.C.A. § 3-6-302(b)(2) and (a)(3).

The registration statements of both employer and lobbyist must be updated upon the occurrence of any event or circumstance that "renders the registration statement inaccurate or incomplete." T.C.A. § 3-6-302(c).

By rule, the Ethics Commission will establish registration fees for lobbyists and employers of lobbyists. T.C.A. § 3-6-301(e). The legislative fiscal note accompanying the ethics bill indicated that the fee would likely be \$200 for each filing. The current fee is \$100 and covers all registrations by the lobbyist.

The registration year will begin October 1, rather than the current calendar year. T.C.A. § 3-6-302(g). All required registrations and reports must be filed electronically.

Effective October 1, 2006, each employer of a lobbyist must file an employer disclosure report for the preceding six-month period. T.C.A. § 3-6-303. The first such report will be due May 15, 2007, forty-five days after the six-month period ending March 31. The second report of each year is due November 14, forty-five days following the six-month period ending September 30.

The required employer's disclosure consists of three parts. The first is the "aggregate total amount of lobbyist compensation paid by the employer." For compensation paid to a person who performs duties in addition to lobbying "and related activities," the compensation is to be apportioned "to reflect the lobbyist's time allocated for lobbying and related activities in [Tennessee]." There is no definition of "related activities." The

report is to be in monetary ranges from less than \$10,000 to \$400,000 or more. T.C.A. § 3-6-303(a)(1).

The second part of the report is the "aggregate total amount of employer expenditures incurred for the purpose of influencing legislative or administrative action through public opinion or grassroots action, excluding lobbyist compensation." The Act contains a laundry list of activities that constitute "public opinion and grassroots action." There is a required apportionment for "multi-state effect," and the report is to be in ranges from less than \$10,000 to \$400,000 or more. T.C.A. § 3-6-303(a)(2).

Finally, the employer must report in the same filing the "aggregate total amount" of expenditures for events paid for by the employer to which the entire membership of the Tennessee General Assembly was invited. T.C.A. § 3-6-303(a)(3).

Prohibited Acts

In addition to a prohibition against bribery (T.C.A. § 3-6-304(a)), the Act prohibits:

- i. *False statements* to state government officials by lobbyists and their employers. T.C.A. § 3-6-304(b).
- ii. *Loans* or payments for goods or services in excess of market value to government officials by lobbyists, or use of a lobbyist's credit card by a government official. T.C.A. § 3-6-304(d), (f) and (g).
- iii. Employers of lobbyists and political action committees controlled by employers of lobbyists from making *campaign contributions* to a candidate for governor or to a member of the General Assembly during any session of the General Assembly. T.C.A. § 3-6-304(i).
- iv. Lobbyists from making any *campaign contributions* to candidates for governor or members of the General Assembly at any time. T.C.A. § 3-6-304(j).
- v. Lobbyists from being paid a success bonus or on a *contingent fee* basis. T.C.A. § 3-6-304(k).
- vi. Members of the General Assembly and governor or members of the governor's cabinet from being a *lobbyist within twelve months after leaving their government position*. T.C.A. § 3-6-304(l).
- vii. Lobbyists from serving on any *state board or commission* "having jurisdiction to regulate the business endeavors or professional activities of any employer of the lobbyist." T.C.A. § 3-6-304(m).

Gift Prohibition and Exceptions

Neither an employer of a lobbyist nor a lobbyist may give a gift to any official in the legislative or executive branch or to an official's immediate family (spouse and minor children). T.C.A. § 3-6-305(a) and 3-6-301(12). The definition of gift does not include gifts to immediate family or relatives within the third degree of consanguinity (second cousins). T.C.A. § 3-6-301(11).

The rule prohibiting such gifts is stated in two paragraphs. The exceptions to the rule take six pages. Noteworthy exceptions include the following:

- i. Gifts may be given "for a non-business purpose and motivated by close personal friendship." Such gifts will be defined and authorized by rule of the Ethics Commission after October 1, 2006. T.C.A. § 3-6-305(b)(3).
- ii. An *employer of a lobbyist* may provide "benefits of participation" in an event in Tennessee sponsored by or for the benefit of charitable organizations provided the benefits of participation are the same as non-state officials enjoy at the event. No monetary limitation is applicable to this exemption. T.C.A. § 3-6-305(b)(6)(C).
- iii. Entertainment, food and refreshments may be provided at an event *in Tennessee* to which invitations are extended to the entire membership of the General Assembly. The total aggregate cost for such an event must not exceed \$50 per person (exclusive of tax and gratuity). A copy of the invitation must be delivered to the Ethics Commission and each member of the General Assembly at least seven days in advance of the event, and the cost of the event must be reported to the Ethics Commission within 30 days following the event. The cost of the event must also be included in the aggregate cost of such events reported on the employer's semi-annual disclosure. T.C.A. § 3-6-305(b)(8).
- iv. Entertainment, food and refreshments may be provided at an event *in Tennessee* at which an official of state government is a speaker "at a scheduled meeting of an established and recognized membership organization which has regular meetings." The event must be paid for by the organization, and the per-person cost may not exceed \$50 per person (excluding tax and gratuity). No reporting is required. T.C.A. § 3-6-305(b)(9).
- v. Food and refreshments may be provided by an *employer of a lobbyist* at an event *in Tennessee* if:
 1. the value of the food and refreshment to the official does not exceed \$50 (excluding tax and gratuity);
 2. the cumulative value to any single official does not exceed more than \$100 during a calendar year; and

3. an officer or management-level employee (who is not a lobbyist) of the employer of the lobbyist is present.

Further, this exception applies to a member of the General Assembly *only if* the member does not receive a *per diem* allowance from the state on the day on which the event is held. No reporting is required. T.C.A. § 3-6-305(b)(10).

Until October 1, 2006, all matters required to be reported to or filed with the Ethics Commission are to be filed with the Registry of Election Finance. Section 54, Chapter 1, Public Acts Extraordinary Session 2006.

Penalties

The Ethics Commission may assess a civil penalty on an employer of a lobbyist and on a lobbyist for failure to timely: (a) register; (b) pay a registration fee; or (c) file a required report. The penalty is not more than \$25 per day up to a maximum of \$750. T.C.A. § 3-6-306(a)(1)(A) and (a)(2)(A).

The Ethics Commission may assess a civil penalty of up to \$10,000 for: (a) knowingly filing inaccurate or incomplete statements or reports; (b) an employer utilizing the services of a lobbyist who is not registered; (c) a lobbyist lobbying without registering; or (d) either an employer of a lobbyist or a lobbyist violating a prohibited act or the gift prohibition. T.C.A. § 3-6-306(a)(1)(B) and (a)(2)(B).

In addition, an intentional violation is a criminal offense and may be prosecuted by the appropriate district attorney general. The first offense is punishable as a class C misdemeanor (up to 30 days imprisonment and a fine of not more than \$50 or both); the second as a class B misdemeanor (not more than six months imprisonment and a fine of not more than \$500 or both); and the third as a class A misdemeanor (not more than 11 months, 29 days imprisonment and a fine of not more than \$2,500 or both). T.C.A. § 3-6-306(d).

The Ethics Commission is required annually to audit, on a random basis, the registration statements and other reports of at least 2% of all lobbyists. The Ethics Commission also has the authority, upon a finding of probable cause, to audit the registration statements and reports of an employer of a lobbyist or of a lobbyist. T.C.A. § 3-6-308(a)(7).

Ethics Commission

The Ethics Commission is composed of six members: two appointed by the Governor; two appointed by the Speaker of the House of Representatives; and two appointed by the Speaker of the Senate. Three members will be Republicans and three will be Democrats. After initial staggered terms, members will serve four-year terms and may serve two consecutive terms.

The commission members are to be appointed by April 1, 2006. The Ethics Committee will be fully empowered to enforce the new law on October 1, 2006.

Members of the Ethics Commission and their families may not hold state or local public office, may not be an employee of the state or any local government, may not be an officer of a political party or a political committee, participate in any way in any election campaign or lobby or employ a lobbyist. T.C.A. § 3-6-103.

The Ethics Commission is required to recommend "guiding principles of ethical conduct" to the General Assembly, the governor and lobbyists. The commission has the power to promulgate rules and regulations pursuant to the Uniform Administrative Procedures Act to implement the provisions of the law. The Ethics Commission, in conjunction with the Tennessee Attorney General, may conduct investigations, including compelling the attendance of witnesses. T.C.A. § 3-6-201-209. Further, the commission is to conduct ethics courses for the executive branch, the General Assembly and lobbyists and employers of lobbyists. Each lobbyist is required to attend one ethics course annually. The Ethics Commission "shall provide an ethics manual for lobbyists and employers of lobbyists," and lobbyists are required to "deliver" a copy of the manual to each new employer of that lobbyist. "Delivery" of the manual must be verified by the employer of the lobbyist on the initial lobbyist registration statement. T.C.A. § 3-6-105-114.

Conclusion

Despite the increased complexity of the regulatory scheme created by the legislature, the Comprehensive Governmental Ethics Reform Act provides relatively straightforward guidance, particularly with regard to the question of who is a lobbyist and to the questions arising from entertainment of government officials. The Act also creates an enforcement capability heretofore lacking that, if effective, will be a step toward more transparent governmental decision-making.



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