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CONFIDENTIAL FORMAL ADVISORY OPINION

February 12, 2016

Andrew H. Holton, Esquire
General Counsel
Department of State Treasurer
3200 Atlantic Avenue
Raleigh, NC 27604

Re: Permissibility of State Treasurer Serving on Corporate Boards of Directors
AO-E-16-001

Dear Mr. Holton:

By e-mail dated January 6, 2016, you requested a formal advisory opinion on behalf of North Carolina State Treasurer Janet Cowell ("Treasurer Cowell"). You sought guidance concerning whether the State Government Ethics Act, G.S. Chapter 138A ("Ethics Act"), would restrict Treasurer Cowell from serving on corporate boards of directors and accepting compensation, meals, and travel expenses associated with her board service. You also ask whether other employees of the Department of State Treasurer ("DST") would be restricted from serving on corporate boards. Although this opinion focuses specifically on Treasurer Cowell's obligations under the Ethics Act, the same standards would apply to other DST employees.

This formal advisory opinion is based upon the information you have provided and was adopted by the State Ethics Commission ("Commission") at its February 12, 2016, meeting.¹

I. Brief Conclusion

Although the Ethics Act would not restrict Treasurer Cowell's service on corporate boards of directors or her acceptance of compensation, food and beverages, and travel expenses directly related to that service, the conflict of interest provisions of the Ethics Act may restrict her from taking official action in certain matters affecting those companies. The Ethics Act would also prohibit Treasurer Cowell from using confidential or nonpublic information to benefit

¹ Please see the enclosure entitled "Formal Advisory Opinions Issued by the State Ethics Commission" for further information regarding the protections offered to individuals receiving those opinions.

those companies and from allowing those companies to include her title in company advertising. Finally, Treasurer Cowell may not use State resources in certain forms of advertising that include her name, picture, or voice.

II. Facts

Janet Cowell is the North Carolina State Treasurer. As such, she is a “public servant” who is subject to the Ethics Act. The DST administers the State employee retirement and health benefits programs, manages the assets of the Teachers’ and State Employees’ Retirement System (“Retirement System”), and manages State and local debt issuance. Treasurer Cowell also serves as the Chair of the State Banking Commission.

Currently, Retirement System funds are invested in various securities portfolios that are managed by professional investment managers hired by the DST. Those investment managers select the securities included in each portfolio in accordance with general investment guidelines developed by employees of the DST’s Investment Management Division. Those guidelines establish investment targets in various broad business sectors and do not focus on investments in particular corporations. The portfolio’s external investment manager selects the particular securities that will be held in the portfolio.

Treasurer Cowell has recently been approached by two corporations, ChannelAdvisor Corporation (“ChannelAdvisor”) and James River Group Holdings Ltd. (“James River”), about the possibility of serving on their corporate boards of directors. ChannelAdvisor, located in Research Triangle Park, is a cloud-based ecommerce company that assists online retailers and manufacturers with online marketing and access to ecommerce sales data. The Company’s stock trades on the New York Stock Exchange (“NYSE”). James River is a Bermuda-based insurance holding company with offices in Raleigh and other U.S. locations. It owns and operates specialty insurance and reinsurance companies that provide casualty and property insurance to various industries. James River’s shares are also sold on the NYSE.

ChannelAdvisor and James River are not registered as a lobbyist principal and are not regulated by the DST. You have also stated that the companies are not DST vendors and do not otherwise do business with the DST. Finally, neither company is included in a Retirement System investment portfolio. However, you note that there is a possibility that an investment portfolio may include holdings in one or both of those companies in the future. But that determination would be made by the professional investment manager that manages the portfolio, not DST employees.

III. Applicable Statutory Provisions

A. Conflicts of Interest, Use of Title, and Disclosure of Confidential Information

Although the Ethics Act does not restrict a public servant’s private business or personal pursuits, it may restrict a public servant’s participation in certain “official actions” that could financially benefit the public servant and the public servant’s family members, their employers, or businesses in which they hold ownership interests or serve in a leadership position as an officer or corporate board member; or official actions that may result in a financial loss to a

business competitor of those individuals or entities. “Official action” is broadly defined to include “any decision ... made or contemplated in any proceeding, application, submission, request for ruling or other determination, contract, claim, controversy, investigation, charge, or rule making.” G.S. 138A-3(25).

Specifically, G.S. 138A-31(a) restricts a public servant from using his or her public position in an official action that would result in a “financial benefit” to the public servant, a member of the public servant’s extended family, or a “business with which the public servant is associated” where that benefit would influence the public servant. “Financial benefit” is defined as a “direct pecuniary gain or loss” to a “business with which associated” or a loss to a business competitor of that business. G.S. 138A-3(14c). “Business with which associated” constitutes a company for which a public servant serves as a corporate board member.

G.S. 138A-31(a) excludes financial benefits that “are so remote, tenuous, insignificant, or speculative that a reasonable person would conclude under the circumstances that the covered person’s ... ability to protect the public interest and perform the covered person’s ... official duties would not be compromised.”

G.S. 138A-36(a) similarly restricts a public servant from taking official action which would provide a “reasonably foreseeable” financial benefit to the public servant or a “business with which associated” if that benefit would impair the public servant’s independence of judgment. However, there are a number of situations in which a public servant may take official action notwithstanding a conflict of interest, including those actions that would provide a similar benefit or detriment to all members of a profession, occupation, or general class. G.S. 138A-38(a)(1).

G.S. 138A-36(c) also requires that a public servant remove himself or herself from a quasi-legislative or quasi-judicial proceeding where the public servant has a familial, personal, or financial relationship with a participant to the extent necessary to protect the public interest.

Public servants are also restricted from disclosing or using confidential information obtained in connection with their official position under any circumstance. And public servants may not use or disclose “nonpublic” information obtained as a result of a public servant’s official position if such disclosure or use would result in a financial gain to the public servant, extended family members, or a business with which the public servant is associated. G.S. 138A-34.

Finally, G.S. 138A-31(b) restricts a public servant’s use of his/her public position or title in connection with a privately-funded advertisement promoting a private business. However, a public servant may include his or her title in a biographical listing included on a company’s website or in informational materials provided by the company and which includes other relevant work experience in addition to the public servant’s public position. And, public servants are prohibited from using “state funds” for advertisements or public service announcements that include their name, picture, or voice and are included in a newspaper or on radio, television, or billboards. “State funds” has been interpreted by the Commission to include not only State monies but also State resources including “personnel, facilities, equipment, or supplies.” AO-E-13-004 (August 23, 2013)

B. The Ethics Act's Gift Ban

The gift ban of the Ethics Act generally restricts public servants from knowingly accepting direct or indirect "gifts" from registered lobbyists and lobbyist principals and persons or businesses that are "doing or seeking to do" business with or are regulated by a public servant's agency, unless a gift ban exception applies. G.S. 138A-32(c) and (d).

The term "gift" is defined to include "anything of monetary value given or received without valuable consideration" G.S. 138A-3(15). There are a number of items that are excluded from the definition of gift, including "contractual arrangements or commercial relationships or arrangements made in the normal course of business and not made for the purpose of lobbying." G.S. 138A-3(15)c. Thus, the gift ban does not restrict certain benefits by a public servant if they are consistent with the benefits customarily given to other similarly-situated individuals. AO-LEC-13-002 (January 21, 2014)

IV. Analysis

In fulfilling her role as a member of the ChannelAdvisor and James River boards, Treasurer Cowell will be acting in her private capacity. Therefore, neither G.S. 138A-31(a) nor G.S. 138A-36 would restrict her from serving on those boards. But those statutory provisions would restrict Treasurer Cowell from taking official action in her capacity as Treasurer if that action would provide a reasonably foreseeable financial benefit to those companies or a detriment to their competitors. Such an action would include making a decision to directly invest Retirement Plan funds in either company or to direct an investment manager of those funds to include the stock of either company in an investment portfolio. However, you have stated that the decision to invest in particular securities rests with the external professional investment managers, not DST employees. Therefore it is unlikely that DST employees will be in a position to direct investments in either company. Moreover, Treasurer Cowell has stated that she will recuse herself from making decisions about any of those investments.

Treasurer Cowell would also be restricted from using her official position to advance ChannelAdvisor's or James River's business interests. That would include promoting those companies to the news media, the general public, or the investment community if such actions could be reasonably foreseen to result in a financial benefit to those companies. The Ethics Act would also restrict Treasurer Cowell's disclosure of confidential information or use of nonpublic information obtained in her official position to benefit either company. Thus, she should take care not to use or disclose such information in connection with her board service.

Furthermore, Treasurer Cowell should ensure that the companies in question do not use her official title in company advertising. An exception to that restriction allows the use of official titles in biographical listings, including those on a company's website. However, in light of the potential impact, the Commission encourages Treasurer Cowell not to allow the use of her official title in biographical listings on ChannelAdvisor's or James River's website unless it also includes the biographical listings of similarly-situated board members. She should also ensure that State funds, personnel, or other resources are not used in connection with advertisements or public service announcements published in newspapers or those broadcast on radio, television, or billboards that include their name, picture, or voice.

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Finally, the gift ban would not restrict Treasurer Cowell's receipt of those benefits customarily extended to other ChannelAdvisor or James River board members, including the reimbursement of travel expenses, receipt of food and beverages at board meetings and other activities associated with board membership, or compensation for board service.

V. Closing

Thank you for contacting the State Ethics Commission. Please do not hesitate to call the Commission's staff if you have any questions about the foregoing formal advisory opinion.

Formal Advisory Opinions Issued by the State Ethics Commission

Upon the written request of a public servant or legislative employee, G.S. 138A-13(a) of the State Government Ethics Act (“the Ethics Act”) authorizes the State Ethics Commission (“Commission”) to issue formal advisory opinions on the “meaning and application” of the Ethics Act “and the public servant’s or legislative employee’s compliance therewith.” All opinions have prospective application only, are limited to the particular facts presented, and confer limited civil immunity upon a requester who follows the advice given. G.S. 138A-13(a) and (a2).

Reliance upon a formal advisory opinion immunizes the public servant or legislative employee making the request from (1) investigation by the Commission, except the alleged violation of criminal law while performing his or her official duties, (2) adverse action by his or her employing entity, or (3) investigation by the Secretary of State. G.S. 138A-13(a2).

Once issued by the Commission, formal advisory opinions are published in a redacted format on the Commission’s website within 30 days of issuance. G.S. 138A-13(d). Otherwise, requests for advisory opinions, the opinions themselves, and all materials related to the opinions are confidential and are not public records. G.S. 138A-13(e).

Upon the written request of any person, State agency, or governmental unit affected by G.S. Chapter 120C (“the Lobbying Law”), G.S. 120C-102(a1) authorizes the State Ethics Commission (“Commission”) to issue formal advisory opinions “on the meaning and application” of the Lobbying Law and “that person’s, State agency’s or any other governmental unit’s compliance therewith.” All opinions have prospective application only and must relate to real or reasonably anticipated fact settings or circumstances. G.S. 120C-102(a). Formal advisory opinions confer limited civil immunity upon a requester who follows the advice given. G.S. 120C-102(a1).

Once issued by the Commission, formal advisory opinions are published in an edited format on the Commission’s website within 30 days of issuance. G.S. 120C-102(c). Requests for advisory opinions, the opinions themselves, and all materials related to the opinions are confidential and are not public records. G.S. 120C-102(d). However, the Commission is required to send an unedited copy of each formal advisory opinion to the Secretary of State’s Office at the time the formal advisory opinion is issued to the requester, and the Secretary of State is required to treat the formal advisory opinion as confidential and not a matter of public record. G.S. 120C-102(d1). In addition, Commission staff is specifically authorized to share all information and documents related to requests for formal advisory opinions with the Secretary of State’s Office. The Secretary of State’s Office is required to treat any such information and documents in its possession as confidential and not a matter of public record G.S. 120C-102(d1).