



October 26, 2021

## **ADVISORY OPINION 21-01**

### **INTRODUCTION**

The Tennessee Ethics Commission (“Commission”) thru the Commission’s staff received several inquiries regarding whether it was a permissible exception to the general statutory prohibition precluding employers of lobbyists from providing gifts to General Assembly members for an employer of a lobbyist to provide each member of the Tennessee General Assembly with a one fifth bottle of liquor as part of a gift basket and as part of a virtual in-state event as described at Tenn. Code Ann. § 3-6-305(b)(8). At its June 29, 2021 meeting, the Commission found that the providing of these gift baskets, including the bottle of liquor, was permitted in accordance with the Commission’s Advisory Opinion 08-01, issued on July 1, 2008. The Commission nonetheless asked Commission staff for guidance on the continued viability of the findings of Advisory Opinion 08-01, and the Commission now readdresses those findings.

### **QUESTION**

Does the providing of a gift basket, which included a one-fifth bottle of liquor and other food items, by an employer of a lobbyist to members of the Tennessee General Assembly at an in-state event, held pursuant to Tenn. Code Ann. § 3-6-305(b)(8) (whether conducted in person or virtually), qualify under any exception at Tenn. Code Ann. § 3-6-305(b) to the general prohibition under Tenn. Code Ann. § 3-6-305(a) that employers of lobbyists may not provide a gift, directly or indirectly, to an official in the legislative branch?

### **ANSWER**

With all due respect to Advisory Opinion 08-01 issued by prior members of this Ethics Commission, upon further review, the Commission now concludes that gifts provided to attendees at an in-state event held under Tenn. Code Ann. § 3-6-305(b)(8) that are not intended to be used or consumed at or during the event itself, but instead are intended to be given to the attendee for personal use outside the event, do not come within the exception set forth at Tenn. Code Ann. § 3-6-305(b)(8). Such gifts may come within other exceptions to the general gift prohibition, particularly Tenn. Code Ann. §§ 3-6-305(b)(4) & (6), if the specific facts evidence that the gifts in question come within the confines of one of these exceptions.

### **ANALYSIS**

The Comprehensive Governmental Ethics Reform Act of 2006 (“Act”), specifically Tenn. Code Ann. § 3-6-305(a), prohibits an employer of a lobbyist or a lobbyist from providing a

gift, directly or indirectly, “to a candidate for public office, official in the legislative branch, official in the executive branch, or immediate family of such candidate or official.” However, Tenn. Code Ann. § 3-6-305(b) carves out several exceptions to this general gift prohibition. One exception is for “[e]ntertainment, food, refreshments, meals, beverages, or health screenings” that are provided in connection with an in-state event to which invitations are extended to the entire membership of the general assembly, subject to certain other conditions set forth in this statutory exception. Tenn. Code Ann. § 3-6-305(b)(8). The sole question before the Commission is whether a gift basket which included a one-fifth bottle of liquor and other food items would fall within the definition of “food, refreshments, meals, [or] beverages” provided in connection with an in-state event (whether conducted in person or virtually) or would qualify under any other exceptions to the gift prohibition.

The Commission previously issued a formal advisory opinion that touches upon and arguably resolves the question under review. In Advisory Opinion 08-01 (July 1, 2008), the Commission addressed the issue whether the gift of a commemorative bottle of wine and wine glasses at an in-state event violated the Comprehensive Governmental Ethics Reform Act of 2006, provided that the total per person cost of the event remained below fifty-one dollars (\$51.00) (the then maximum allowable per person cost established by Tenn. Code Ann. § 3-6-305(b)(8)). The Commission found that each bottle of wine with an affixed commemorative label cost \$12.50, and that each wine glass cost less than \$2.00. The Commission initially concluded the bottles and wine glasses could be used as part of the event. The Commission then determined that the bottles and wine glasses need not be “consumed” at the event to fall within this gift exception, finding these items could be taken from the event by attendees. The Commission concluded:

This does not end the analysis. The wine is not intended to be consumed at the event. Therefore, the next question is whether a beverage or refreshment “provided in connection with” an event must be consumed at the event in order to be within the exception. The specific items enumerated in the exception, “entertainment, food, refreshments, meals, beverages, or health screenings” are all items that either must or may be consumed or experienced at the event. On the other hand, the plain and ordinary meaning of the words “provided in connection with” does not establish a requirement that the items must be consumed at the event. If the Legislature meant to say “consumed or experienced in connection with,” it could have done so.

The Commission, therefore, concludes that the commemorative bottles of wine and wine glasses to be provided in connection with the Association’s open house are within the terms of the exception so long as the other provisions of Tenn. Code Ann. § 3-6-305(b)(8) are met.

Advisory Opinion, 08-01, pp.3-4 (July 1, 2008).

Ethics Commissioner Linda Knight concurred in this result but concluded that the wine glasses were separate gifts and thus did not come within the exception at Tenn. Code Ann. § 3-6-305(b)(8). *Id.*, at 4. She likewise concluded the glasses as specialty items were not given in the

ordinary course of business, and thus did not come within the exception at Tenn. Code Ann. § 3-6-305(b)(4) as “[s]ample merchandise, promotional items, and appreciation tokens, if such merchandise, items and tokens are routinely given to customers, suppliers or potential customers or suppliers in the ordinary course of business.” *Id.*, at p. 5. Commissioner Knight instead found that the glasses, as well as the bottles of wine, came within the exception at Tenn. Code Ann. § 3-6-305(b)(6) as “opportunities and benefits made available to all members of the general public.” *Id.* In addition, she concluded the bottles of wine also came within the exception at Tenn. Code Ann. § 3-6-305(b)(8). *Id.*

Upon further consideration, this Commission is convinced that the wording of the statutes at issue, coupled with well-established rules of statutory construction under the law of Tennessee, require a finding that gifts, whether in the form of food, refreshments, meals, beverages, or other items (such as the wine glasses addressed by Advisory Opinion, 08-01), provided to attendees as a component of an in-state event held under Tenn. Code Ann. § 3-6-305(b)(8) that are not intended to be used or consumed at or during the event itself, but instead are intended to be given to the attendee for personal use outside the event, do not come within the exception set forth at Tenn. Code Ann. § 3-6-305(b)(8). Such gifts would include the gift basket containing the one-fifth bottle of liquor that is the subject of this advisory opinion.

Initially, Tenn. Code Ann. § 3-6-305(b)(8) is an exception to the general rule that direct and indirect gifts by lobbyists and employers of lobbyists to legislative officials, including General Assembly members, are prohibited. The Tennessee Supreme Court has reiterated on several occasions that such exceptions to a general statutory provision are strictly construed. *City of Kingsport v. Quillen*, 512 S.W.2d 569, 573 (Tenn. 1974); *Anderson Fish & Oyster Co. v. Olds*, 197 Tenn. 604, 277 S.W.2d 344, 347 (1955). In analyzing these questions, the Commission is focused on giving effect and deference to the Supreme Court’s guidance and the rules of statutory construction relied upon by the Courts. One such rule of construction states that a court, when construing a statute, will endeavor “to ascertain and to give effect to the legislative intent without unduly restricting or expanding a statute’s coverage beyond its intended scope.” *Bryant v. Baptist Health System Home Care of East Tennessee*, 213 S.W.3d 743, 748 (Tenn. 2006). Further, the courts have directed that, in determining the legislative intent, the courts should derive such intent “from the natural and ordinary meaning of the statutory language within the context of the entire statute” and should avoid applying to the statute “any forced or subtle construction that would extend or limit the statute’s meaning.” *Id.* quoting *State v. Flemming*, 19 S.W.3d 195, 197 (Tenn. 2000).

Here, while the Commission agrees with Commission staff in construing Tenn. Code Ann. § 3-6-305(b)(8) to allow a virtual rather than a live in-state event due to the extraordinary circumstances caused by the COVID-19 pandemic, particularly in light of the numerous executive orders enacted by the Governor’s Office during this time to promote remote activity and allow both government and private industry to continue operations virtually during the pandemic<sup>1</sup>, any such virtual event must still meet all the other requirements of Tenn. Code Ann. § 3-6-305(b)(8). This specific exception to the general rule allows “gifts” that consist of

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<sup>1</sup> See, the Executive Orders of Governor Bill Lee at Executive Orders #4-18, 22, 25-26, 30-31, 36, 38, 49, 51, 52, 68, and 70; and subsequent amendments at Executive Orders 19-21, 23-24, 27-29, 30-35, 37, 50, 55, 59-61, 63-67, 71-74, and 77-80. <https://sos.tn.gov/products/division-publications/executive-orders-governor-bill-lee>

“[e]ntertainment, food, refreshments, meals, beverages, or health screenings that are provided in connection with the in-state event”, provided that other value restrictions and reporting requirements are observed. Tenn. Code Ann. § 3-6-305(b)(8). However, the statute does not explicitly extend this language to include items as gifts that are intended to be consumed outside of, or after the conclusion of, the in-state event and/or retained permanently by the attendee. Again, with all due respect to Advisory Opinion 08-01 issued by prior members of this Ethics Commission, this Commission is of the opinion that the Commission should not and cannot expand the statute’s coverage to allow activities not explicitly deemed permissible by the statute itself. Rather, reading this language strictly, as required by Tennessee’s rules of statutory construction, the Commission finds that the statute contemplates that these various enumerated items are to be delivered, consumed, and experienced during the course of the in-state event and does not extend to include items that are intended to be taken off the premises of the in-state event if conducted in-person, such as commemorative bottles of wine or wine glasses, or items that, practically speaking, would continue to be consumed after the conclusion of a 2-3 hour virtual event, such as a one-fifth bottle of liquor. In the specific context of a virtual event, the Commission acknowledges the permissibility under this statute of a “box lunch” or “snack bag” which is small and intended to be consumed during the virtual event; however, this allowance would not extend to food or beverage items that are so large, or of such a volume, that they are unlikely to be consumed, and are not intended to be consumed, by one person during the course of the virtual event, such as a one-fifth bottle of liquor, or items of such a nature that they are not intended to be consumed contemporaneously with the virtual event, such as a box of frozen steaks or a gift basket of other luxury food items<sup>2</sup>. Such an interpretation not only more accurately conforms to the rules of statutory construction noted above, but also more faithfully adheres to the Comprehensive Governmental Ethics Reform Act’s overall goal of promoting “confidence in government” by ensuring that those permissible gifts provided to members of the General Assembly by employers of lobbyists and lobbyists are limited and do not create the appearance of corruption or unethical conduct. Tenn. Code Ann. § 3-6-102.

Furthermore, the Commission is of the opinion that this same analysis and the same limitations also apply to the following subsections: Tenn. Code Ann. § 3-6-305(b)(9) (allowing “entertainment, food, refreshments, meals, amenities, or beverages that are provided in connection with an in-state event at which a candidate for public office, an official in the legislative branch, or an official in the executive branch, or an immediate family member of the candidate or official is a speaker or part of a panel discussion at a scheduled meeting of an established and recognized membership organization that has regular meetings;...”) and Tenn. Code Ann. § 3-6-305(b)(10) (allowing “food, refreshments, meals or beverages that are provided by an employer of a lobbyist in connection with an in-state event to which invitations are extended to an official or officials in the legislative branch or official or officials in the executive branch;...”). In each of these scenarios, the statute contemplates only entertainment, food, refreshments, meals, amenities, or beverages that are provided “in connection with an in-state

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<sup>2</sup> The Commission notes here that the current dollar value limitation applicable under Tenn. Code Ann. § 3-6-305(b)(8) is \$63.00. However, this cost is determined based on the “the per person contractual cost for the event or the per person cost for the event based on the number of persons invited..., excluding sales tax and gratuity.” Therefore, the Commission is acutely aware of the need to limit and/or prevent unscrupulous conduct by individuals or corporations who may have access to luxury items at a reduced actual cost and/or who may be induced to improperly report costs by relying on inaccurately inflated invitation lists, thereby creating the appearance of possible unethical conduct or pay-to-play arrangements.

event” and the statute does not explicitly extend this language to include items as gifts that are intended to be consumed outside of, or after the conclusion of, the in-state event and/or retained permanently by the attendee.

If Tenn. Code Ann. § 3-6-305(b)(8) is inapplicable to allow a gift basket, or any other gift, provided as part of an in-state event, then the next question is whether any of the other exceptions to the general gift prohibition would apply. The two exceptions that may be applicable in similar situations are Tenn. Code Ann. § 3-6-305(b)(4) and (6). Subsection (b)(4) provides an exception for “[s]ample merchandise, promotional items, and appreciation tokens, if such merchandise, items and tokens are routinely given to customers, suppliers or potential customers or suppliers in the ordinary course of business.” Tenn. Code Ann. § 3-6-305(b)(4). Similarly, subsection (b)(6), relied upon by Commissioner Knight in her concurring opinion in Advisory Opinion 08-01, makes an exception for “[o]pportunities and benefits made available to all members of an appropriate class of the general public.” Tenn. Code Ann. § 3-6-305(b)(6).

Both of these exceptions will necessarily involve a factual inquiry, i.e. whether the employer of the lobbyist routinely gives such items as gifts to “customers, suppliers or potential customers” and/or makes this benefit “available to all members of an appropriate class of the general public.” The Commission would note that, assuming items provided as gifts fall within either of these exceptions, then the cost of those items should not be included in the calculation of the maximum allowable cost per person, per in-state event under Tenn. Code Ann. § 3-6-305(b)(8), since those items come within these different exceptions that have no such cost limitation.

Charles Traughber, Chair  
Tammy S. White, Secretary  
Stacey Floyd-Thomas  
Duane Gilbert  
Lynn Richardson

Commissioners

Commissioner Stranch dissents

Adopted: October 26, 2021

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