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When Indirect Funding Vehicles May Contribute Funds to the Insurance Commissioner and Other Elected Officials

On June 22, 2009, Georgia's State Ethics Commission (the "Commission") issued an important advisory opinion¹ clarifying the general application of state campaign finance laws as they relate to indirect campaign contributions made through an intermediary, such as a corporate affiliate of a regulated entity or via a political action committee (a "PAC") funded, in whole or in part, by a regulated entity. Specifically, the opinion addressed whether an elected official can accept campaign contributions from such an intermediary, which originally received the funds from an entity regulated by such elected official. The opinion also addressed three inter-related questions regarding how a specific provision of the Georgia Ethics in Government Act (the "Act") applies to the Commissioner of Insurance of the State of Georgia (the "Insurance Commissioner").

By way of background, Chapter 5, Section 30.1 of the Act prohibits any regulated entity from contributing "to or on behalf of" a candidate for the office of an elected executive officer or an elected executive officer that regulates such entity.² The Act defines a "regulated entity" as any person³ (1) required by law to be licensed by an elected executive officer or a board under the jurisdiction of the elected executive officer; (2) who leases property owned by or for a state department; or (3) who engages in a business or profession which is regulated by an elected executive officer or a board under the jurisdiction of the elected executive officer.⁴ An "elected executive officer" (an "Elected Officer") is narrowly defined to include six state-wide elected officers: the Secretary of State, Attorney General, State School Superintendent, and the Commissioners of Insurance, Agriculture and Labor.⁵

The first key question which the Commission examined is whether the corporate form of a contributor affects the application of Section 30.1 of the Act. In other words, does the application of Section 30.1 serve to prohibit a parent,

subsidiary, affiliate or holding company of a regulated entity from contributing to an Elected Officer's campaign committee if such a related entity is not regulated by the Elected Officer? According to the opinion, so long as the parent, subsidiary, affiliate or holding company of a regulated entity (1) is not licensed or regulated by an Elected Officer; (2) is not *acting on behalf* of a regulated entity; and (3) is not established solely to circumvent statutory prohibitions contained in the Act, then Section 30.1 is not applicable, and a contribution to the political campaign committee of an Elected Officer is permissible. Notably, an unregulated entity is deemed to be *acting on behalf* of a regulated entity if the unregulated entity makes a contribution to an Elected Officer's campaign committee "with funds transferred or generated by a regulated entity . . . [or] at the behest of, or in consultation or coordination with a regulated entity."⁶

As applied to the insurance industry, the first key question answered in the advisory opinion does little to clarify whether an insurance holding company would be able to contribute funds to an Elected Officer because the holding company might be considered "licensed and regulated by an Elected Officer" depending on the type and volume of the transactions effectuated within the holding company structure. Under Georgia law, an insurance holding company is not required to obtain a license from the Insurance Commissioner, however, to the extent that the holding company effectuates certain transactions with an insurer registered in Georgia, such transactions are subject to various statutory provisions of the Georgia Insurance Code and review and regulation by the Insurance Commissioner.⁷ In addition, the Insurance Commissioner, pursuant to Ga. Code Ann. § 33-16-6, has the authority to order any insurer who is "a member of an insurance holding company system," to "produce any records, books, or other information papers in the possession of the insurer or its *affiliates*."⁹ The definition of the term "affiliate" is broad enough to capture an

insurance holding company. Because the Insurance Commissioner has the power to require a domestic insurer to produce documents belonging to the domestic insurer's affiliates, an argument can be made that the Insurance Commissioner thereby indirectly regulates a domestic insurer's holding company as an affiliate and, thus, may not be able to lawfully accept campaign contributions from such an "indirectly regulated" affiliate.

Thus, it remains uncertain as to whether an insurance holding company that is subject to indirect regulation by the Insurance Commissioner would be construed as either a regulated entity or a "company licensed and regulated by an Elected Officer" for purposes of determining the legality of a contribution by such insurance holding company to an Elected Officer's campaign committee. Further, any contribution to an Elected Officer by an insurance holding company would be examined because the source of the contributed funds may be revenue generated or dividends paid by the insurer within the holding company structure and transferring money from a regulated entity through an unregulated entity to an Elected Officer is illegal. Despite the foregoing, an employee of a parent, subsidiary, affiliate or holding company of a regulated entity continues to be able to contribute personal funds to an Elected Officer's campaign committee.

The second key question which the Commission analyzed is whether Section 30.1 prohibits a PAC that accepts contributions from a regulated entity from contributing to an Elected Officer's campaign. According to the opinion, to the extent that the PAC (1) is not under the direction or control of a regulated entity; (2) does not coordinate or consult with a regulated entity regarding the contribution; and (3) does not contribute anything of value that it received from a regulated entity, then the PAC may contribute to an

Elected Officer's campaign committee because the PAC is not *acting on behalf* of a regulated entity. In order to comply with these guidelines, a PAC must account for and separate any money it receives from a regulated entity in order to ensure that those funds are not inadvertently transferred by the PAC to an Elected Officer's campaign committee. Further, the advisory opinion states that unless an Elected Officer knows or should know that a PAC is indirectly contributing to the Elected Officer's campaign committee funds transferred to the PAC by a regulated entity, then the Elected Officer's campaign committee is "entitled to presume that funds contributed were not transferred or generated by a regulated entity."¹⁰

In addressing the third key question, the advisory opinion provides guidance as to the extent of regulation required by an Elected Officer over an entity to satisfy the definition of regulated entity and, subject to such extent of the regulation, whether an Elected Officer's campaign committee could legally accept contributions from minimally regulated entities. Pursuant to its statutory authority, the Insurance Commissioner grants licenses to certain persons to transact insurance and also issues various permits. The advisory opinion draws a distinction between those persons required to be licensed by the Insurance Commissioner and those who only receive a permit,¹¹ and mandates that only licensees of the Insurance Commissioner are considered regulated entities. Foreign corporations authorized to transact insurance outside of Georgia but not required to be licensed in Georgia are not regulated entities for purposes of Section 30.1 of the Act and, thus, may contribute funds to an Elected Officer's campaign committee provided that the foreign corporation adheres to all the applicable guidelines outlined in the advisory opinion.

In summary, the Commission will scrutinize any Elected Officer's campaign committee accepting PAC funds or contributions from non-regulated entities within the same corporate family as a regulated entity to determine the nature and relationship between the campaign-funding intermediary and such funding intermediary's source of revenue as well as the extent of regulation over any indirectly involved entity subject to the rules and regulations of the state agency over which the Elected Officer has oversight. If a non-regulated entity within the same corporate family as a regulated entity contributes funds to an Elected Officer's campaign committee, then corporate separateness must be maintained and the contribution must be the result of the non-regulated entity's independent business judgment.¹² If an independent PAC¹³ accepts funds from a regulated entity, the PAC may not transfer those funds to an Elected Officer's campaign committee on the regulated entity's behalf nor consult with the regulated entity as to whom it should make campaign contributions. Failure to adhere to any of the aforementioned rules may result in a civil penalty of up to \$1,000 for each violation and up to \$10,000 for repeat violations.¹⁴ By law, any person who knowingly fails to comply with or who knowingly violates the Act shall be guilty of a misdemeanor.¹⁵

Endnotes

- 1 State Ethics Commission, Advisory Op. No. 2009-02 (June 22, 2009).
- 2 Ga. Code Ann. § 21-5-30.1(b) (2009) (emphasis added).
- 3 A "person" is defined to include both individuals and business entities. See e.g., Ga. Code Ann. § 21-5-3(19) (2009).
- 4 Ga. Code Ann. § 21-5-30.1(a)(5) (2009).
- 5 Ga. Code Ann. § 21-5-30.1(a)(3) (2009).
- 6 State Ethics Commission, Advisory Op. No. 2009-02, at 3 (June 22, 2009)
- 7 Ga. Code Ann. § 33-13-5 (2009).
- 8 The term "insurance holding company system" means two or more affiliated persons, one or more of which is a

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- domestic insurer. See, Ga. Code Ann. § 33-13-1(4) (2009).
- 9 Ga. Code Ann. §§ 33-13-6 & 33-13-4 (2009) (emphasis added). Note that the insurer must be authorized to transact business in Georgia before the Insurance Commissioner may order an examination of its affiliates.
 - 10 *Id.* at 4.
 - 11 Although the Georgia Insurance Code does not define a “permit,” it is a defined term under Georgia’s Fire Protection and Safety statute. See e.g., Ga. Code Ann. § 25-12-2(6) (2009). In Georgia, the Insurance Commissioner is also the Safety Fire Commissioner.
 - 12 As a best practice to follow, any contribution to an Elected Officer’s campaign committee made by a non-regulated entity within the same corporate family as a regulated entity should be made at the behest of the independent board of directors of the non-regulated entity.
 - 13 An independent PAC is not created by a regulated entity, its corporate family or its employees.
 - 14 Ga. Code Ann. § 21-5-6(b)(14)(C)(i) (2009).
 - 15 Ga. Code Ann. § 21-5-6(9) (2009).

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Brian T. Casey is co-leader of the Insurance Practice Group. He is also a member of the firm’s Corporate and Healthcare Practice Groups as well as the firm’s Climate Change Practice Team. Mr. Casey focuses on (i) corporate, (ii) merger & acquisition, corporate and structured finance and other transactional, and (iii) regulatory matters for corporate clients in the insurance, financial services and health care industries. His clients include insurance companies, insurance holding companies, managing general agents and insurance agencies, third party and claims administrators, banks and other financial institutions, investment banks and reinsurance companies.

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