

August 30, 2023

Nancy Johnson
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Re: Request for Advisory Opinion dated May 17, 2023 (No. 23-02)

Dear Ms. Johnson:

The Ethics Commission ("Commission") is in receipt of your request for an advisory opinion dated May 17, 2023. As previously communicated to you, the Commission has decided to issue an advisory opinion in accordance with N.D.C.C. § 54-66-04.2. The question presented to the Commission for consideration relates to attendance and participation by public officials at an out-of-state event:

Each year, the North Dakota Soybean Council (NDSC), the administrator of the soybean checkoff which is tasked with research and education on the commodity, sponsors a See For Yourself – Pacific Northwest Soybean Handling Infrastructure Tour. This educational tour is aimed at soybean farmers.

The Council would like to extend an invitation to participate in the tour to farmer legislators. In an abundance of caution, as the advocacy arm of the soybean industry in North Dakota, the ND Soybean Growers Association is requesting an advisory opinion about including legislators in this program.

I. FACTUAL BACKGROUND

North Dakota Soybean Council

The North Dakota Soybean Council is a qualified state soybean board under the federal Soybean Promotion, Research and Consumer Information Act ("Soybean Act"). The Soybean Act promotes domestic soybean production and research financed from assessments charged on a per unit basis of soybeans sold to a first purchaser. 7 U.S.C. §§ 6301, 6304(l). The Soybean Act also established the United Soybean Board, which decides how assessments are invested. Id. § 6304(b)-(f). The assessments are collected by a qualified state soybean board, such as the North Dakota Soybean Council. Pursuant to the Soybean Act, North Dakota Soybean Council

retains one-half of the assessments and then remits the remainder to United Soybean Board. Id. §§ 6304(l)(1)(A)-(B), (m).

The North Dakota Soybean Council is currently a state agency¹ and Section 4.1-11-10 of the North Dakota Century Code establishes its duties to include:

- (1) developing policies and initiating programs to promote the development of markets for and increase the utilization of soybeans grown in the state;
- (2) developing and disseminating information regarding the purpose of the soybean assessment and ways in which the assessment benefits soybean producers;
- (3) determining the uses for which any moneys raised under this chapter may be expended.

See N.D.C.C. § 4.1-11-10.

Pursuant to the Soybean Act, the United Soybean Board and qualified state soybean boards are prohibited from using funds collected through assessments “in any manner for the purpose of influencing legislation or governmental action or policy.” 7 U.S.C. § 6304(p). This section is interpreted as a prohibition on lobbying.

According to the Council, the “See For Yourself” program was established by the North Dakota Soybean Council approximately ten (10) years ago for the purpose of educating soybean farmers, Council members, and Council staff regarding the soybean supply chain. The program consists of out-of-state travel. For instance, in 2023, the program attendees gathered in Portland, Oregon. The 2023 program included tours of ports and terminals and presentations by industry experts. The North Dakota Soybean Council funds the program.

North Dakota Soybean Growers Association

According to its website, the North Dakota Soybean Growers Association is a statewide, member-driven, nonprofit organization. See ndsoygrowers.com/about. The Association exists to conduct legislative activities at both the state and national level to improve the sustainable prosperity of its soybean farmer members and the entire soybean industry. Id.

It is the mission of the North Dakota Soybean Growers Association to “create partnerships to proactively improve the profitability and representation of all North Dakota soybean growers and to develop quality community leaders.” Id.

¹ Beginning on June 30, 2024, the North Dakota Soybean Council will no longer be recognized as an agency or department of the State of North Dakota. Instead, the North Dakota Soybean Council will be a non-governmental entity governed by federal law.

II. LEGAL BACKGROUND

Section 2 of Article XIV of the North Dakota Constitution provides:

A lobbyist may not knowingly give, offer, solicit, initiate, or facilitate a gift to a public official. A public official may not knowingly accept a gift from a lobbyist.

...

"Gift," as used in this subsection, means any item, service, or thing of value not given in exchange for fair market consideration, including gifts of travel or recreation. However, "gift" does not mean any purely informational material, campaign contribution, or, in order to advance opportunities for North Dakota residents to meet with public officials in educational and social settings inside the state, any item, service, or thing of value given under conditions that do not raise ethical concerns, as determined by rules adopted by the ethics commission.

N.D. Const. Art. XIV(2)(1). Section 54-66-03 of the North Dakota Century Code codifies this portion of Article XIV and outlines the civil penalties for violations of the section. In 2020, the Ethics Commission adopted rules related to gifts, found in North Dakota Administrative Code (N.D.A.C.) Article 115-03. These rules further define the terms "gift," "lobby," and "lobbyist." Section 115-03-01-01(2) defines "gift" to mean "any item, service, or thing of value not given in exchange for fair market consideration, including gifts of travel and recreation." N.D.A.C. § 115-03-01-01(2). The term "lobby" means:

- a. Attempts to secure the passage, amendment, or defeat of any legislation by the legislative assembly or the approval or veto of any legislation by the governor of the state.
- b. Attempts to influence decisions made by the legislative management or by an interim committee of the legislative management.
- c. Attempts to secure passage, amendment, or defeat of any administrative rule or regulation by any department, agency, or body of the state's executive branch.
- d. Attempts to otherwise influence public official action or decision.

N.D.A.C. § 115-03-01-01(4). Additionally, a "lobbyist" is defined as a "person who engages in activity that falls within the definition of the term 'lobby.'" N.D.A.C. § 115-03-01-01(5).

The baseline rule is that lobbyists may not knowingly give, offer, solicit, initiate, or facilitate a gift to a public official in conjunction with any effort by the lobbyist to lobby the public official. N.D.A.C. § 115-03-01-02(1). Reciprocally, a public official may not knowingly accept a gift from

a lobbyist offered in conjunction with the lobbyist's efforts to lobby the public official. However, there are several exceptions to this general, baseline rule. Id.

Pursuant to Section 115-03-01-03 of the North Dakota Administrative Code, the gift prohibition does not apply to certain enumerated items given under conditions that do not raise ethical concerns. N.D.A.C. § 115-03-01-03. Three of those items that are exceptions to the gift prohibition are included in Section 115-03-01-03, namely:

5. Reimbursement or payment for transportation, lodging costs, and meal costs not to exceed rates as authorized under N.D.C.C. § 44-08-04 and office of management and budget Fiscal Policy #505 to facilitate attendance to a public or private educational and social event within the state, if the public official meaningfully participates in the event as a speaker or panel participant, presenter, or ceremonial event appropriate to the position, or if attendance is appropriate to the performance of official duties.

...

7. Food and beverage served for immediate consumption at any private or public social and educational event.

...

8. Food or beverage with a value of ten dollars or less, excluding gratuity, purchased for a public official in conjunction with an informal social and educational event. The purchased food and beverage must be consumed during the event. A state resident must be present but is not required to be the purchaser of the food and beverage.

N.D.A.C. §§ 115-03-01-03(5), (7), (8). Both a private social and educational event and a public social event are defined as unique events held within the state of North Dakota, attended by state residents, and include an educational component. See N.D.A.C. §§ 115-03-01-01(7), (9). An "informal social and educational event" is similarly defined as an event that occurs in the North Dakota. N.D.A.C. § 115-03-01-01(3).

III. ETHICS ANALYSIS

The question presented by the North Dakota Soybean Growers Association for the Commission's consideration is affected by how the gifting rules within Title 115-03 of the North Dakota Administrative Code apply to out-of-state travel by public officials when travel is paid by either an organization or the state of North Dakota. The linchpin of this analysis is answering the question whether an entity, organization, business, or group is "lobbying" the public official.

As discussed above, the general rule is that lobbyists may not knowingly give, offer, solicit, initiate, or facilitate a gift to a public official in conjunction with any effort by the lobbyist to lobby the public official. N.D.A.C. § 115-03-01-02(1). Reciprocally, a public official may not knowingly accept a gift from a lobbyist offered in conjunction with the lobbyist's efforts to lobby the public official.

When determining whether out-of-state travel expenses (which may include registration fees, per diem reimbursements, hotel costs, food, and/or beverages) are prohibited gifts under Section 115-03-01-02, one needs to ask two fundamental questions: (1) is the travel expense a gift and (2) is the gift given in conjunction with an effort to lobby a public official by a lobbyist. If the answer to both of these questions is "yes" then the travel expense is a prohibited gift under Section 115-03-01-02.

To answer the first question, travel expenses are unquestionably gifts under Title 115 – it is specifically referenced as an example of a gift in Section 115-03-01-01(2). To answer the second question, one needs to look to the definition of the terms "lobby" and "lobbyist." The term "lobby" means:

- a. Attempts to secure the passage, amendment, or defeat of any legislation by the legislative assembly or the approval or veto of any legislation by the governor of the state.
- b. Attempts to influence decisions made by the legislative management or by an interim committee of the legislative management.
- c. Attempts to secure passage, amendment, or defeat of any administrative rule or regulation by any department, agency, or body of the state's executive branch
- d. Attempts to otherwise influence public official action or decision.

N.D.A.C. § 115-03-01-01(4). Determining whether "lobbying" will or has occurred at an out-of-state event is most easily identifiable when it falls within the definitions outlined in subsection (a) through (c) above. However, additional guidance may better help public officials identify whether a lobbyist is attempting "to otherwise influence public official action or decision." N.D.A.C. § 115-03-01-01(4)(d).

There is a spectrum of activities and efforts that may be considered "lobbying" as defined in subsection (d). Some out-of-state conferences and events provide objective, educational materials regarding pertinent topics – these conferences may present research-based findings, hold panel discussions with experts on topics, or provide factual updates on developing areas. The Commission compares these objective educational out-of-state conferences to continuing education, professional development, or vocational training. These types of out-of-state conferences and events are unlikely to be considered lobbying as defined in N.D.A.C. § 115-03-01(4) as these are aimed at providing education only.

Other out-of-state events may present information from a particular perspective and are consequently more subjective. The individuals preparing materials, presenting materials, or engaging in discussions at an event may have an agenda that aligns with a political, social, or educational agenda. While these events present information, it is often presented through a filter than aligns to an agenda and opposing views are excluded. These types of out-of-state conferences and events may be considered lobbying as defined in N.D.A.C. § 115-03-01(4). Public officials should exercise caution and fully determine whether there are attempts, either passively or actively, to influence their action and decisions. Consequently, these types of events or conferences should be evaluated for "attempts to influence public official action or decision" on a base-by-case basis. See N.D.A.C. § 115-03-01-01(4)(d).

When reviewing these types of out-of-state events for lobbying efforts, public officials can consider the following factors:

- (1) Overarching objectives of the event sponsor(s);
- (2) Topics of presentations, panel discussions, or social occasions;
- (3) Scope and type of invitees to the event;
- (4) Materials provided to a public official before, during, and after the out-of-state event; and
- (5) Communications received by a public official before, during, and after the out-of-state event from the event sponsor or other invitees.

Yet, other out-of-state events clearly attempt to persuade or influence public official action or decision. For instance, when a public official attends an out-of-state event and is presented with scripted or suggested legislation to bring back to North Dakota, lobbying as defined in N.D.A.C. § 115-03-01-01(4)(a)-(d) can unquestionably occur.

Ultimately, it is the responsibility of the public official to determine whether there is an attempt to influence official action or decision when accepting travel expenses related to out-of-state events. Moreover, such evaluation by a public official may need to be made for separate and distinct events (such as dinners, socials, or tours) held at a conference. If a public official determines there is an attempt to influence official action, the public official has the ability to leave the event or stay and pay market value for attendance at the event in accordance with N.D.A.C. § 115-03-01-02.

In order for the gift prohibition to apply, the gift must be given by a "lobbyist." A "lobbyist" is defined as a "person who engages in activity that falls within the definition of the term 'lobby.'" N.D.A.C. § 115-03-01-01(5). The term lobbyist, as defined within N.D.A.C. § 115-03, is more expansive than the definition of "lobbyist" within N.D.C.C. § 54-05.1-02 who are required to be registered with the Secretary of State. The term "lobbyist" as used in N.D.A.C. § 115-03 excludes certain individuals from being considered lobbyists. See N.D.A.C. § 115-03-01-01(5). A "lobbyist" does not include legislators; private citizens who appear on the citizen's own behalf;

employees, board members, volunteers, or agents of the state or its political subdivisions when those individuals are acting in their official capacity. Id.

At the time of the issuance of this opinion, the North Dakota Soybean Council is a state agency and its employees, board members, or agents are not lobbyists. See N.D.A.C. § 115-03-01-01(5). However, the North Dakota Soybean Council ceases to be a state agency on June 30, 2024. Therefore, in the future, the North Dakota Soybean Council, and its employees, members, and agents, could be defined as a “lobbyist.” Regardless of the North Dakota Soybean’s status as a non-lobbyist or potential lobbyist, the Commission reaches the same conclusion.

Based upon information publicly available and provided by the North Dakota Soybean Council, it appears the See for Yourself program is aimed at providing education regarding the soybean industry, particularly the supply chain. While the program certainly aligns to the agenda of the North Dakota Soybean Council, there does not appear to be attempts, either passively or actively, to influence public officials’ actions and decisions outside of providing them with hands-on education. Moreover, the North Dakota Soybean Council is prohibited from “influencing legislation or governmental action or policy” as a qualified state soybean board. See 7 U.S.C. § 6304(p). Additionally, the See for Yourself programs are attended by other North Dakota residents, not public officials alone.

Therefore, the Commission concludes the North Dakota Soybean Council is not “lobbying” legislators who attend out-of-state See for Yourself events. The payment of travel expenses for legislators to participate in See For Yourself – Pacific Northwest Soybean Handling Infrastructure Tour is not a prohibited gift under N.D.A.C. § 115-03-01-02 as the gift is not given or accepted in conjunction with efforts to lobby public officials by a lobbyist. This conclusion is based upon the presumption the North Dakota Soybean Council is fully compliant with the federal prohibition against lobbying. The Commission notes its analysis may change if the North Dakota Soybean Growers Association, an entity tasked with legislative activities on behalf of its members, or another lobbyist, participates in out-of-state travel with public officials or otherwise give gifts to public officials to attend the event or portions of the event.

With that conclusion, the Commission wishes to further expound on another consideration regarding out-of-state travel for public officials. Pursuant to Section 115-03-01-03 of the North Dakota Administrative Code, the gift prohibition does not apply to certain enumerated items given under conditions that do not raise ethical concerns. A lobbyist may give a gift to a public official under certain circumstances. N.D.A.C. § 115-03-01-03. Three of those items that are exceptions to the gift prohibition are included in Section 115-03-01-03, namely:

5. Reimbursement or payment for transportation, lodging costs, and meal costs not to exceed rates as authorized under N.D.C.C. § 44-08-04 and office of management and budget Fiscal Policy #505 to facilitate attendance to a public

or private educational and social event within the state, if the public official meaningfully participates in the event as a speaker or panel participant, presenter, or ceremonial event appropriate to the position, or if attendance is appropriate to the performance of official duties.

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7. Food and beverage served for immediate consumption at any private or public social and educational event.

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8. Food or beverage with a value of ten dollars or less, excluding gratuity, purchased for a public official in conjunction with an informal social and educational event. The purchased food and beverage must be consumed during the event. A state resident must be present but is not required to be the purchaser of the food and beverage.

N.D.A.C. §§ 115-03-01-03(5), (7), (8). There remains a question of whether a lobbyist can give these gifts to a public official in conjunction with out-of-state lobbying events.

Ultimately, these exceptions will not apply to out-of-state events. Both a private social and educational event and a public social event are defined as unique events held within the state of North Dakota, attended by state residents, and include an educational component. See N.D.A.C. §§ 115-03-01-01(7), (9). An "informal social and educational event" is similarly defined to occur in North Dakota. N.D.A.C. § 115-03-01-01(3). These exceptions, by their plain language, apply "within the state" of North Dakota only. These exceptions do not apply outside North Dakota and, therefore, cannot be a basis for the payment by lobbyists to public officials for out-of-state travel expenses, including lodging, transportation, food, or beverage (even if immediately consumed) when offered in conjunction with attempts to influence public official action or decision.

IV. CONCLUSION

The Commission answers Ms. Johnson's question as follows: The payment of travel expenses by the North Dakota Soybean Council for legislators to participate in See For Yourself – Pacific Northwest Soybean Handling Infrastructure Tour is not a prohibited gift under N.D.A.C. § 115-03-01-02 as the gift is not given or accepted in conjunction with efforts to lobby public officials by a lobbyist.

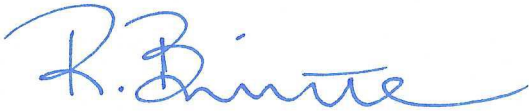
As of the date of this opinion, the North Dakota Soybean Council is a state agency and not a lobbyist. Moreover, once the North Dakota Soybean Council is no longer a state agency, the out-of-state event is educational and does not appear to influence public official action or

decision. The federal restriction on lobbying placed on the North Dakota Soybean Council is a significant factor in concluding the out-of-state event is educational.

In accordance with N.D.C.C. § 54-66-04.2, this advisory opinion is to be published on the Ethics Commission website and accessible to the public. The Commission thanks Ms. Johnson for seeking advice regarding this issue.

This Advisory Opinion was approved by the Ethics Commission at a special meeting held August 30, 2023.

Sincerely,



Rebecca Binstock
Executive Director, North Dakota Ethics Commission