South Carolina Commission on Ethics Reform

On October 18, 2012, Governor Nikki R. Haley issued Executive Order 2012-09 creating the South Carolina Commission on Ethics Reform ("Commission") for the purpose of providing "a comprehensive review and update of current ethics and open records laws by an independent, objective and bipartisan group of experienced individuals." The Commission was directed to request and evaluate written recommendations from the public, to include citizens; public interest groups; state and local government agencies, officials, and employees; the State Ethics Commission; and the legislative ethics committees. Consistent with the requirements of Executive Order 2012-09, this written report is provided to the Governor, the General Assembly, and most importantly, the citizens of South Carolina.

The following individuals served as members of the Commission: Henry McMaster, Esq. and Travis Medlock, Esq. as Co-Chairmen, Dean Charles Bierbauer, Benjamin Hagood, Esq., Mr. Flynn Harrell, C. Kelly Jackson, Esq., Ms. Monica Key, Susi McWilliams, Esq., Mr. Bill Rogers, John Simmons, Esq., and F. Xavier Starkes, Esq. James Burns, Esq. served as counsel to the Commission, and Professor John Simpkins served as a legal expert to the Commission.

In carrying out its mission, the Commission held five (5) public meetings, to include three (3) public hearings, and accepted oral testimony and written recommendations from members of the public, government officials, and public interest groups. In order to investigate, research, and develop the Commission's recommendations, the Commission was divided into three (3) sub-committees to address the following topic areas: a) Ethics/Conflicts of Interest/Campaign Finance; b) Ethics Enforcement; and c) FOIA/Open Records. In addition to research related to specific recommendations, the Commission also researched the ethics laws and open records laws of the forty-nine (49) other states. Importantly, the Commission acknowledges that the members of by the Unified Judicial System are governed by the Supreme Court of South Carolina pursuant to the South Carolina Constitution. This comprehensive report including the list of recommendations is the product of the Commission's work.

The Commission acknowledges the valuable contributions and recommendations of many individuals and groups including: numerous interested South Carolina citizens; Governor Nikki Haley; Attorney General Alan Wilson; m embers of the General Assembly; State Inspector General Patrick J. Maley, the State Ethics Commission; Common Cause of South Carolina; Dr. Thomas B. Higerd; th e League of Women Voters of South Carolina; the Municipal Association of South Carolina; former Senator Mike Rose; the S.C. Association of Counties; the S.C. Association of School Administrators; the S.C. Law Enforcement Officers' Association; the S.C. Pol icy Council; the S.C. Progressive Network; the S.C. School Boards Association; Mr. Trey Walker, Director of State Relations for the University of South Carolina.

Over twenty years have passed since our General Assembly addressed comprehensive ethics reform. The time is upon us again. Our state is positioned for great prosperity and success. But to achieve this, our people must have confidence in, and respect for, their institutions, including our government at all levels. Our recommendations are offered to tha t end.

This report does not address every change and improvement which must be made. Rather, in the time and scope of our Commission, we sought to identify those areas which need immediate attention as well as some which would stimulate the further examin ation of broad categories of needed change. The work of ethics reform is never over. We hope that our efforts will inform and encourage the insights and enthusiasm of others committed to the vision of South Carolina as the best place to be.

We thank Governor Haley for giving us the opportunity to serve our great State, of which we are deeply proud.

Henry McMaster

Co-Chairman

Travis Medlock

Co-Chairman

January 28, 2013

ETHICS/CONFLICTS OF INTEREST AND CAMPAIGN DISCLOSURE SUBCOMMITTEE

RECOMMENDATION 1: Revise statutory language governing the filing of the Statement of Economic Interests for non-incumbent candidates. The S.C. Ethics Reform Commission recommends, at a minimum, that the General Assembly amend S.C. Code Ann. § 8-13-1356(B) to provide:

"A candidate must electronically file a statement of economic interests with the state ethics Commission for the preceding calendar year prior to filing a declaration of candidacy or petition for nomination."

ISSUE: The current statutory language in S.C. Code Ann. § 8-13-1356(B) created immense confusion regarding how candidates (not incumbents) were to file a Statement of Economic Interests in light of the mandatory electronic filing with the State Ethics Commission. During the 2012 election cycle, hundreds of individuals were removed from primary elections due to confusion of the specific statutory requirements for filing a Statement of Economic Interests. The statute currently requires the candidate to file the statement of economic interest with the same official with whom the candidate files a declaration of candidacy or petition for nomination. The proposed statutory change should eliminate confusion over the filing of a paper versus an electronic copy of a candidate's Statement of Economic Interests during an election cycle by centralizing the filing of all statements of economic interest with the State Ethics Commission. This recommendation has broad support among those individuals holding office currently, the State Ethics Commission, and relevant non-governmental entities. There should also be a mechanism by which officials of the political parties can verify that such action has been taken.

RECOMMENDATION 2: Currently, all public officials must disclose in his or her State of Economic Interests his own income and that of his "immediate family members" from public (government) sources. "Immediate family member" is defined as his or her spouse and dependent children living in the public official's household. A public official must report the source and the amount of these taxpayer funds he receives.

The Commission recommends that all public officials should also disclose all private sources of income. The disclosure must include the name and address of the income source, and the nature of the goods or services provided for that income. Income to a business which is owned in whole or in part by the public official is deemed to be income to him.

As to the private sources of income, the Commission recommends that all public officials also report the amount of the income if : 1) the source or a lobbyist on its behalf has sought or

will seek official action by the public official, the public official's office or the governmental entity upon or in which the public official serves; or 2) the source or will be subject to regulation by the public official, the public official's office, or the public official's governmental entity; or 3) the source has or will have any contractual or financial relationship with the public official in his official capacity, the public official's office, or the public official's governmental entity.

For example, a member of a city council, county council, or a member of the General Assembly must report the amount of income from a company (lobbyist's principal) which employs a lobbyist for communication with the public official's governmental entity; a mayor's spouse must report the amount of income from a company having business before the mayor or the city council; a member of the school board must report the amount of any income he receives from a company which has a contract with the school district. Therefore, public officials must disclose specific amounts of income provided by lobbyist's principals, and public officials must disclose specific amounts of income provided by businesses that have contracts with or are regulated by the government.

The following table illustrates the recommended disclosures:

Individual	Income Source Disclosure	Specific Income Amounts Disclosed
Public Official (as that term is defined by the Ethics Reform Act)	All sources of income: -Public sources -Private sources -Lobbyist's principals -Businesses with government contract and associated relationship with public official	-Income from <u>any</u> public source or government entity -Income from <u>any</u> lobbyist's principal -Income from a business with government contracts and associated with the public official
Public Official's Immediate Family Member	All sources of income: -Public sources -Private sources -Lobbyist's principals -Businesses with government contract and associated relationship with public official	-Income from <u>any</u> public source or government entity -Income from <u>any</u> lobbyist's principal -Income from a business with government contracts and associated with the public official
Public Member (as that term is defined by the Ethics Reform Act)	All sources of income: -Public sources -Private sources -Lobbyist's principals -Businesses with government contract and associated relationship with public member	-Income from <u>any</u> public source or government entity -Income from <u>any</u> lobbyist's principal -Income from a business with government contracts and associated with the public member

<u>ISSUE</u>: S.C. Rules of Conduct provide: "A public official, public member, or public employee may not knowingly use his official office, membership, or employment to influence a government decision to obtain an economic interest for himself, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated." While the Commission cannot identify every possible situation which may lead to a conflict of

interest, this recommendation seeks to support the rule that an individual may not use his public office for private gain. Disclosure of sources of income by public officials, their spouses, and dependent children will promote transparency and prevent conflicts of interest so that when a public official casts a vote or takes official action, the public will have a way to determine whether that public official may profit from the official action taken. Where a public official or spouse has an occupation which implicates client-confidentiality issues, the source of income could be identified by categories, e.g., "worker's compensation clients" rather than individual clients.

The Commission debated at length whether to require disclosure of all income either by total amounts received or disclosure of total amounts by income brackets. We note that federal officials and their spouses must report all sources of income.

We believe that reporting of income and amounts is important to full disclosure of the public official's interests and the potential for actual or perceived conflicts of interest. However, we are also concerned about the financial privacy of public officials and family members, especially since the Ethics Reform Act applies not only to full time state officials and part-time legislators, but also to numerous members of state boards and commissions and local governing bodies. We are concerned that unwarranted invasion into financial privacy will discourage participation in public service. The Commission believes that this recommendation achieves the appropriate balance between these important conflicting considerations.

Exhibit A provides background information related to income disclosure laws in other states.

RECOMMENDATION 3: Revise the Statement of Economic Interests filed by all public officials to require the disclosure of all fiduciary positions held, whether compensated or uncompensated, to include the name of the entity, title of position, the date the position was assumed, and a brief description of the duties performed. This disclosure requirement would not apply to religious, social, fraternal, or political entities to which a public official belongs.

ISSUE: Like the financial disclosures in Recommendation # 2, disclosures of positions held by a public official will promote public confidence in the ethical decision-making of those elected officials who also hold certain fiduciary positions.

RECOMMENDATION 4: Currently, S.C. Code Ann. § 8-13-745(A) provides that a legislator or an individual or business with whom the legislator is associated cannot represent a client for a fee before of a governing body of a state agency, commission board, department,

or other entity ("State Board") if the legislator has voted in an election, appointment, recommendation, or confirmation of a member of the State Board. The Commission recommends enlarging this prohibition to include "influencing in any way" the process, as well as voting in it. "Influencing in any way" should be defined to include: voting at any committee or subcommittee level; making recommendations or speaking informally to those legislative colleagues who will be voting; and making recommendations or speaking informally to the executive official or legislative colleague who makes the initial appointment.

ISSUE: The current ethics law and this recommendation seek to prevent or disclose conflicts of interest and improper influence by legislators without creating overly-broad prohibitions which could penalize practicing lawyers or any potential legislator from serving as a member of the General Assembly.

RECOMMENDATION 5: Under S.C. Code Ann. § 8-13-745(A), a legislator who votes to elect, appoint, recommend, or confirm an individual to a state agency, commission board, department, or other entity ("State Board") cannot represent a client for a fee in a contested case before that State Board for a period of twelve (12) months after casting his vote for that individual. We recommend extending this period to twenty-four (24) months.

ISSUE: Lengthening that period of recusal from twelve (12) to twenty-four (24) months will reduce the likelihood of an actual or apparent conflict of interest.

RECOMMENDATION 6: S.C. Code Ann. § 8-13-740 permits legislators to appear before governmental entities, to include state agencies and commissions, a court of the Unified Judicial system, or contested cases so long as: 1) the decisions of the governmental entity are ultimately subject to review in court or by contested case hearing; and 2) the legislator does not vote or influence the budget for the governmental entity. It should be revised for clarification.

ISSUE: We recommend it should expressly allow representation and providing advice on matters prior to an appearance before the tribunal. This revision will clarify the boundaries of a legislator's ability to represent clients for a fee before governmental entities.

RECOMMENDATION 7: Legislators should report on their Statement of Economic Interests professional fees to themselves or their firms for handling judicial cases where a state agency is an opposing party.

ISSUE: S.C. Code Ann. § 8-13-740(B) already requires legislators to report on their Statement of Economic Interests: 1) any fees that the legislators or their firms earn for appearing before a state agency in a contested case; and 2) the nature of such contacts that were made in the earning of the fees. No disclosure is currently required where the state agency is the opposing party. Our recommendation would require legislators to disclose fees where the state agency is an opposing party. We would also expand current disclosure to include fees earned prior to an actual court appearance or the commencement of the action, such as contact with the agency staff.

RECOMMENDATION 8: Revise S.C. Code Ann. § 8-13-1300(6) to provide as follows:

> (6) The term "committee" means a combination of two or more individuals, such as any person, committee, association, organization, or other entity that makes or accepts anything of value to make, contributions or expenditures and has one or more of the following characteristics:
>
> A. Is controlled by a candidate;
>
> B. Is a political party or executive committee of a political party or is controlled by a political party or executive committee of a political party; or
>
> C. Has the major purpose to support or oppose the nomination or election of one or more clearly identified candidates. Supporting or opposing the election of clearly identified candidates includes supporting or opposing the candidates of a clearly identified political party.
>
> If the entity qualifies as a "committee" under sub-subdivision A, B, or C of this subdivision, it continues to be a committee if it receives contributions or makes expenditures or maintains assets or liabilities. A committee ceases to exist when it winds up its operations, disposes of its assets, and files its final report. The term "committee" includes the campaign of a candidate who serves as his or her own treasurer.

ISSUE: Our current ethics law's definition of "committee" has been found unconstitutional and, thus, unenforceable by two different federal district courts because it is too broad: it

purports to impose the reporting and other regulatory requirements of the State Ethics Commission on all political committees, rather than limiting these requirements to those committees which have as the major purpose, as opposed to a major purpose, the support or opposition of the nomination or election of one or more clearly identified candidates. Thus, various "committees" have been able to participate in our elections without identifying themselves or their contributors. Our revision mirrors the North Carolina's ethics law which has been held constitutional by the Fourth Circuit Court of Appeals, which also governs federal appeals from South Carolina. Revising the definition of "committee" corrects this defect which currently exists. Such "committees" would be required to register with the State Ethics Commission. This statutory change will shed light on "committees" inside and outside South Carolina which seek to influence an election. This was the original goal of our current legislation.

See Appendix 1 for further legal analysis.

RECOMMENDATION 9: Abolish "Leadership Political Action Committees."

ISSUE: Numerous individuals and groups who commented on ethics reform before this Commission expressed concern about the existence of so-called "leadership PACs." "Leadership PACs" can circumvent the contribution limitations by allowing donors to contribute to candidates and also to "Leadership PACs" which then make direct contributions to the candidates. Additionally, these "Leadership PACs" may create the public perception that financial contributions by interested parties are necessary to establish good relationships with the legislature or its leaders. Existing law already prohibits a legislator from receiving a campaign contribution directly or indirectly from a registered lobbyist (S.C. Code Ann. § 8-13-1314(3)). The Senate has banned "Leadership PACs" by rule. We recommend that "Leadership PACs" in both the House and the Senate be abolished by law. The Commission further recommends that S.C. Code Ann. § 8-13-1314 be reviewed to assess the adequacy of contribution limits which have remained unchanged since 1992.

RECOMMENDATION 10: Amend Proviso 89.25 governing the use of State-owned aircraft in two respects for clarity. First, official business for purposes of use of State-owned aircraft should include bill signings, press conferences, and any activity in furtherance of the public official's official duties and responsibilities. Second, delete the words "is prima facie evidence of a violation of Section 8-13-700(A) of the 1976 Code" from Proviso 89.25. The language referenced above should be codified rather than included in a Budget Proviso because it has a permanent effect and will be more accessible in the Code of Laws.

ISSUE: We believe that the use of State-owned aircraft by government officials for official business such as bill signings and press conferences held in the communities affected by them has legitimate, positive aspects, such as promoting a sense of community. However, it is critical that those government resources be used strictly for activities in furtherance of the individual's official duties. The deletion of the language regarding "prima facie evidence of a violation" ensures that the accused official receives the same due process under the procedures of the State Ethics Commission as under other alleged violations.

Further, there is no legislative definition or clear determination regarding the meaning of "official business" for which state-owned aircraft is authorized. For this reason, controversies have occurred over such questions as flights commencing or ending at non-official locations and the propriety of personal "legs" of an otherwise official business flight. Future opinions by the State Ethics Commission recommended in this report based on a clear definition could help resolve this uncertainty.

RECOMMENDATION 11: Add a new provision to Title 8, Chapter 13, Article 7 that excludes from the provisions of S.C. Code Ann. § 8-13-700 (use of official position for financial gain), § 8-13-710 (reporting of gifts by public employees), § 8-13-715 (prohibition of honorarium for speaking engagements of public officials), and § 8-13-755 (public employee not permitted to have economic interest in contracts) those public employees of institutions of higher education who are participating in the development of intellectual property that benefits the institution and the State of South Carolina—even if it also benefits an individual public employee—where the institution retains some royalty rights to the intellectual property.

ISSUE: Certain employees of institutions of higher education, such as MUSC, USC, and Clemson, participate in the development of intellectual property and the growth of the state's knowledge-based economy through state authorized programs such as the SC SmartState and SC Launch. Typically, university policy or other intellectual property agreements allow a sharing of the intellectual property rights, including royalty revenue, between the university and the public employee-inventor. These arrangements provide individual incentive to the public employee-inventor; help recruit national intellectual capital to the university; return financial benefits to the university's investment in personnel, equipment and programming; and invigorate the state's economy. Frequently, private sector partners, such as drug manufacturers, BMW, and other corporate partners, will contribute funding and equipment to the entrepreneurial activity. The unintended effect of the broad application of the S.C. Ethics Reform Act to all public employees, public employee-inventors and entrepreneurial faculty puts them in vulnerable legal positions, and thwarts the development of the state's knowledge-based economy. The requirement that the exemption apply only where the state institution

retains some rights to the intellectual property should prevent abuse of the exception to promote purely private endeavors.

RECOMMENDATION 12: Revise S.C. Code Ann. §§ 2-17-10(12), (13), and (20) so as to define "lobbying" and "lobbyist" to include individuals who lobby not only the General Assembly, Offices of the Governor and Lieutenant Governor, state agencies, boards and commissions, but also any political subdivision of the State, to include counties, city councils, municipalities, school districts, and special purpose or public service districts. The registration fee for lobbyists and lobbyists' principals should be increased from the current level of $100.00 per year.

ISSUE: Lobbying occurs at virtually every level of government, but lobbyists are only required to register with the State Ethics Commission when they have direct communication with the highest levels of state government (Office of the Governor, Office of the Lieutenant Governor, statewide constitutional officers, the General Assembly, and state agencies, boards, or commissions). Currently, lobbyists and lobbyist's principals are not required to register if they are lobbying political subdivisions of the state. Transparency should exist at all levels of government, and to the extent that local governments are being lobbied, these activities should be known to the public. Moreover, recommendations in this report reflect a need to increase resources for the State Ethics Commission. By increasing the registration fee for lobbyists, the need to appropriate additional state funds could be lessened. Lobbying fees need not be the same, a variety of factors could determine their calculation.

ETHICS ENFORCEMENT SUBCOMMITTEE

RECOMMENDATION 13: A criminal investigatory team with members from the South Carolina Law Enforcement Division, Department of Revenue, Office of the Inspector General and the State Ethics Commission, with attorneys from the Attorney General's Office should be created and authorized by statute to investigate allegations of criminal public corruption for prosecution.

ISSUE: Most ethics cases would be investigated and resolved by the enhanced State Ethics Commission described later in this report without the participation of the Public Integrity Unit. However, those ethics commission investigations which develop serious criminal allegations would benefit from the availability of the Public Integrity Unit. The State Ethics Commission could refer appropriate cases to the Attorney General for his consideration, including consideration by the Public Integrity Unit. The Attorney General would determine whether to proceed criminally and if so, whether regular investigative procedures would be adequate. If those procedures are not adequate, the Attorney General could seek State Grand Jury authorization since public corruption is within the State Grand Jury's jurisdiction.

Creation of the Public Integrity Unit would bring a strong law enforcement team to address public corruption cases, including those presenting serious ethics violations. Any legislation passed to establish the Public Integrity Unit should address the resources necessary to perform its work. Importantly, all partner agencies of the Public Integrity Unit would share information in furtherance of the Public Integrity Unit's mission.

RECOMMENDATION 14: Revise the statutory language governing the State Ethics Commission to give it the authority and jurisdiction to investigate and take appropriate action, where necessary, against members of the legislative branch. Jurisdiction currently exists for all other public officials, except judges: Under the South Carolina Constitution, the Supreme Court of South Carolina promulgates requirements for investigations of members of the Unified Judicial System. This revision would not abolish the ethics committees of the House or Senate or impede their ability to discipline members for internal behavior, as granted in the South Carolina Constitution. It is further recommended that the composition of the State Ethics Commission be changed to eight members: four to be appointed by the General Assembly and four to be appointed by the Governor. The Commission suggests that members of the State Ethics Commission serve staggered terms of four years each. In addition, legislation to guarantee adequate and stable funding should be adopted to ensure that the operation and integrity of the State Ethics Commission could not be compromised. The State Ethics Commission should also institute a random audit procedure of filings, to include

Statements of Economic Interest and Campaign Disclosures, to insure compliance with the Ethics Reform Act.

ISSUE: The Commission received recommendations fr om numerous governmental and non-governmental entities through testimony and written submissions supporting the authority of an independent ethics body to examine potential violations by members of the General Assembly. We recommend expansion of the compos ition and jurisdiction of the State Ethics Commission to investigate and sanction potential violations by legislators. This can be achieved without constitutional implications by permitting the legislative bodies to continue self-governing issues of internal discipline of members. Allowing an equal number of appointments from the legislative and executive branches would remove the perception of investigative bias against either branch. The Commission notes that sitting members of either the executive or legislative branches should not be appointed to the State Ethics Commission. The Commission also recommends that a procedure be adopted to provide adequate and stable ongoing funding for the State Ethics Commission so that its integrity and viability will not be compromised.

We believe these changes would be consistent with the manner in which all of the ethics oversight bodies were created. The bodies currently charged with investigating ethics complaints against legislators, that is, the House Ethics Committee and the Senat e Ethics Committee are established in Section 8 of the South Carolina Code of Laws. Removing Ethics Act jurisdiction should likewise be accomplished by statute. No separation of powers concerns should arise because the legislature, through the continued existence of the House and Senate Ethics Committees, would retain their vehicles through which the authority given to them by the South Carolina Constitution to discipline members for "disorderly behavior," and impose the sanction of suspension or expulsio n. Specifically, our state Constitution provides only that "each house may . . . punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member, but not a second time for the same cause." Therefore, the Commission doe s not believe a change to the South Carolina Constitution is required to give the State ethics Commission jurisdiction over members of the General Assembly.

In addition, employing statutory means to shift jurisdiction from the Senate and House Ethics Committees to the State Ethics Commission would be consistent with prevailing state practice. In the 40 states with state ethics commissions, 33 of the state comm issions have jurisdiction over the legislative branch of state government. Statutory change is the most common mechanism for establishing state commission jurisdiction over the legislative branch. Only 3 of the 36 states where statewide ethics commissions have authority over legislators have created their commissions through constitutional measures.

The enhanced State Ethics Commission can provide clarity to such perennial questions as what constitutes "personal use" and "ordinary and necessary expenses" r egarding the use of campaign funds and remove any inconsistencies that may exist between the decisions of the House and Senate Ethics Committees and the State Ethics Commission.

Exhibit A provides background information related to state ethics commissions in other states. Also, see Appendices 2 and 3 for further legal analysis.

RECOMMENDATION 15: Revise the statutory language to strengthen penalties for criminal violations of the S.C. Ethics Reform Act.

ISSUE: The Commission received recommendations by oral testimony and written recommendations from a number of governmental and non -governmental entities. While many of our ethics laws are aspirational in nature, it is necessary that penalties for violations of the ethics laws are sufficiently strong to serve as a deterrent. While we do not recommend any specific penalty, we recommend that a progressive scale of some kind be incorporated into the statutory scheme to help determine the appropriate penalty. The State Ethics Commission provided proposed statutory revisions, attached as *Exhibit B*, that the Commission believes addresses the points.

RECOMMENDATION 16: Revise the statutory language regarding the use of campaign funds to pay penalties resulting from a criminal prosecution of the S.C. Ethic s Reform Act. The Commission recommends amending S.C. Code Ann. § 8 -13-1348 as follows:

Section 8-13-1348(A) renumbered (A)(1) and the following subsections added:

(A)(2) Campaign funds may not be used to pay penalties resulting from a criminal prosecution.

ISSUE: Currently, the S.C. Ethics Reform Act permits violators to pay fees, civil and criminal penalties with campaign funds. The Commission believes that penalties resulting from criminal prosecution should not be paid with campaign funds unde r any circumstances.

RECOMMENDATION 17: The Commission recommends enhanced prosecutorial tools for use by solicitors and the Attorney General for addressing public corruption, including serious ethics violations, through the adoption of criminal statute s for mail fraud and wire fraud.

ISSUE: Federal prosecutors have long utilized mail and wire fraud statutes to address public corruption violations. Currently, South Carolina has no such statute, although several other states do including, Illinois, Florida, Mississippi and Utah. Adoption of such statutes would provide a strong enforcement tool in the criminal arena and serve as a strong deterrent, we believe.

RECOMMENDATION 18: The Commission recommends that S.C. Code Ann. §§ 8-27-10 et seq. be amended to its original 1988 version to protect state employees who report abuse, misuse, destruction, or loss of public funds or resources. Further, the Commission recommends that if an employee's report results in a net savings, the employee should be rewarded twenty-five percent (25%) of the net savings, up to $25,000.00.

ISSUE: The Employment Protection for Reports of Violations of State or Federal or Regulation Act, also known as the "Whistleblower Act," was passed and signed into law in 1988. One purpose of this Act is to reward state employees for identifying waste, fraud and abuse related to the use, or misuse, of public resources. Currently, if an employee makes a report related to abuse of government resources, the reward for such identification is limited to $2,000.00. In order for state employees to remain vigilant in identifying waste, fraud, and abuse, the reward should be significant enough to encourage employees to be forthcoming. The original Act also serves to protect those state employees from retribution for being forthcoming when they report abuse of public resources. Over the course of time, this Act has been weakened to the point where a whistleblower is not afforded the necessary protection that was included in the original Act. One of the best sources of transparency is a state employee identifying abuse, and that employee should be protected appropriately.

FOIA/OPEN RECORDS SUBCOMMITTEE

RECOMMENDATION 19: Revise statutory language related to the time for fulfilling Freedom of Information Act ("FOIA") requests for public records. The Commission recommends the General Assembly amend S.C. Code Ann. § 30 -4-30(c) to provide for the following:

- Public bodies shall respond to requests for public information in no more than seven calendar days, indicating whether or not the reques t has been granted.
- If written notification is not received within seven days, the request must be considered as approved.
- If the request is granted or approved, the requested record must be made available no later than 30 days from the date of the original request if there is no charge, or if a deposit is received, then no later than 30 days after receipt of the deposit.
- If requested records are more than 24 months old, the public body may use no more than 45 calendar days to provide them.

ISSUE: Delay is one of the prime obstacles —and sometimes obstructions—to effective use of and respect for the Freedom of Information Act. The current act is really a two -stage process: a defined time to respond to a request indicating whether or not the request will be fulfilled, and an ill-defined time to actually meet that request. Revision would enhance "timely response" in the interest of the public. Listing all requirements in "calendar days" rather than "work days" would promote understanding by the publi c, as different entities may have differing work day definitions. The automatic online posting by government entities of minutes and materials can be effective in obviating the need for many FOIA requests. Digitized records can be more readily accessed, t ransferred and, if necessary, duplicated. Stored paper records, particularly those that may predate digitization and be stored offsite, may require additional time to obtain. Redaction is a necessary process that can consume time. However, it is incumbe nt upon government entities to have clearly assigned responsibilities for staff to process FOIA requests in a timely fashion.

Exhibit A provides information on FOIA request and response times in other states.

RECOMMENDATION 20: Revise statutory language related to the allowable charges for fulfilling Freedom of Information (FOIA) requests for public records. The Commission recommends the General Assembly amend S.C. Code Ann. § 30 -4-30(b) to provide for the following:

- Public bodies may establish fees con sistent with the actual cost of searching for and making copies of records.
- Fees should be charged to reflect the lowest copier rate available to the public body.

- Copy charges may not apply to records stored and transmitted in an electronic format. However, charges for conducting a search for records stored in an electronic format are acceptable.
- When search costs are recoverable, they should be charged at the hourly rate of compensation for the public body's lowest cost, qualified employee.
- Fees should not be charged for the review to determine if the documents are subject to disclosure.
- The number of hours for searches may be capped, depending on the complexity of the search.
- A deposit not to exceed 25% of the anticipated total cost for search and reproduction of the records should be required.

ISSUE: Exorbitant rates charged for searches and copying are as dysfunctional and disrespectful of the process as are voluminous requests that exceed reason. Current law is imprecise regarding charges for the time consumed in searching for or redacting documents. Governmental entities have employed various formulas for determining the cost of copying documents. Public bodies may, indeed, incur widely varying costs for copying, depending on the per page charges in copier contracts. The use of online posting of minutes and documents can minimize copying costs, though citizens without access to online technology retain a right to receive printed copies of requested documents.

RECOMMENDATION 21: Revise statutory language of the Freedom of Information Act (FOIA) to eliminate the current legislative exemption. The Commission also recommends that the General Assembly amend S.C. Code Ann. § 30-4-40(8) to allow for a legislative exemption for drafts of proposed legislation not yet introduced.

ISSUE: Legislators, whose responsibilities include creating FOIA laws, should exempt themselves from compliance with them. Recognizing the importance of confidentiality in the process of crafting legislation, the content of bills prior to their introduction should be protected from disclosure. Similarly, recognizing the importance of personal privacy, existing FOIA exemptions provide the necessary protection concerning constituent correspondence where disclosure might infringe on that privacy. All levels of government should be subject to the same statutory requirements regarding open records. Otherwise, the public trust suffers.

RECOMMENDATION 22: Revise statutory language of the Freedom of Information Act (FOIA) to create enforcement provisions. The Commission recommends the General Assembly amend S.C. Code Ann. § 30-40-100(b) to provide for the following:

- Establish a specific enforcement mechanism through the Administrative Law Court for the speedy resolution of disputes concerning FOIA requests and responses thereto.
- Allocate adequate resources (staffing/funds) for meaningful enforcement.
- Retain right of judicial appeal.

ISSUE: The current law lacks a way to ensure a timely resolution and enforcement. Without enforcement public access to the public information sought is not ensured. In addition, the governmental agency needs a mechanism to seek redress for requests that are proffered solely for reasons of harassment. While several options exist for creating an enforcement mechanism, the Administrative Law Court appears to be most feasible for South Carolina. Other approaches exist. Iowa has this year created the Iowa Public Information Board as an "enforcement agency to resolve complaints regarding violations of Iowa's Sunshine Laws." The authority of the Iowa board commences in mid-2013, so there is no track record of its effectiveness. The Administrative Law Court may require the allocation of resources to provide adequate staffing. Further, the Commission recommends a uniform and simplified pleading form for use by members of the public. It would still be requisite to have an appeals process at an appropriate level in the state judicial system.

RECOMMENDATION 23: Revise statutory language of the Freedom of Information Act (FOIA) to require that any organization supported in whole or in part by public funds or the entity's employees participate in the State Health Plan and/or State Retirement Plan should be considered a "public body" and subject to FOIA.

ISSUE: When an organization is supported in whole or in part by public funds to carry out its operations or its employees participate in the State Health Plan and State Retirement Plan, such organizations should be considered a public body for purposes of FOIA. The Commission believes that the public is entitled to know how its funds are used, to include participation in government programs meant solely for the use of government officials and employees. If the taxpayer is a source of funding for an organization, then the organization should be subject to FOIA. One example of such an organization would be one where the dues of its members are paid by public funds.

EXHIBIT A - STATE COMPARISONS FOR ETHICS REFORM

		Other States	Current SC Law	SC Ethics Reform Commission Recommendations
ETHICS OVERSIGHT[1]	State Ethics Commission: Enforcement	33 states have state commissions with investigative, adjudicatory, and/or other types of jurisdiction over the legislature.	SC is one of only six states where the state ethics commission has no jurisdiction over the legislature.	Grant the State Ethics Commission jurisdiction over the executive and legislative branches.
	State Ethics Commission: Appointment Power	12 states allow multiple branches to independently appoint members to the state ethics commission.	SC is one of 22 states with hybrid types of appointments, including gubernatorial appointments with legislative confirmation.	Create new State Ethics Commission with appointments made by the Governor, Senate, and House.
CONFLICTS OF INTEREST[2]	Disclosure of Sources of Income	47 states require some type of income disclosure of private and public sources.	SC is the ONLY state to require just one source of income to be disclosed: government income.	Revise SEI requirements to include all sources of income, both public and private, including the name and address of the source and the type of income (how the income was earned).
	Disclosure of Income Amounts	11 states require the amount of income to be disclosed: five require the exact amount, and six require categorical amounts.	SC only requires the amount of government income to be disclosed.	Require amounts of income to be disclosed when that income is from a lobbyist principal and/or from a business that contracts with a governmental entity.
	Disclosure of Fiduciary Positions	38 states require fiduciary positions to be disclosed.	SC does not require fiduciary positions to be disclosed.	Require fiduciary positions to be disclosed, whether compensated or uncompensated.
	Disclosure of Client Identification	22 states require some types of client identification disclosure.	SC is one of only five states to only require client-lobbyists to be disclosed.	Require disclosure of professional or consulting services rendered to individual clients.
	Disclosure of Government Contracts	27 states require some disclosure of government contracts, including government contracts with a spouse or immediate family member, with a business with which he/she is associated, and/or at all levels of government.	SC only requires disclosure of government contracts between the public official and the governmental entity for which he/she serves.	Require disclosure of amounts of income received by a public official, spouse, and/or business with which he/she associated that contract with any governmental entity.
TRANSPARENCY[3]	FOIA: Response Time	34 states have a statutory time limit requiring at least an initial response within ten days.	SC is one of only three states with a statutory time limit of more than ten days for an initial response.	Reduce response time to seven calendar days for an initial response, and if approved, then 30 calendar days from the date of original request or if approved with a fee, then 30 calendar days after receipt of deposit.
	FOIA: Legislative Exemption	35 states apply FOIA to the legislature in full.	SC is one of 15 states to exempt the legislature in whole or in part.	Remove the legislative exemption for FOIA to include all legislative records except for records regarding draft legislation.

[1] National Conference of State Legislatures: "State Ethics Committees;" "Membership and Qualification for the State Ethics Commission;" and "State Ethics Oversight Agencies."
[2] National Conference of State Legislatures: "Personal Disclosure for State Legislators: Income Requirements;" and "Statutory Restrictions on Legislators Contracting with the State and Disclosure Requirements."
[3] Reporters Committee for Freedom of the Press: "Open Government Guide."
*NCSL identifies legislators rather than all public officials in its state-by-state research.

EXHIBIT B

SECTION 16-1-20. Penalties for classes of felonies.

(A) A person convicted of classified offenses, must be imprisoned as follows:

(1) for a Class A felony, not more than thirty years;
(2) for a Class B felony, not more than twenty-five years;
(3) for a Class C felony, not more than twenty years;
(4) for a Class D felony, not more than fifteen years;
(5) for a Class E felony, not more than ten years;
(6) for a Class F felony, not more than five years;
(7) for a Class A misdemeanor, not more than three years;
(8) for a Class B misdemeanor, not more than two years;
(9) for a Class C misdemeanor, not more than one year.

SECTION 16-13-230. Breach of trust with fraudulent intent.

(A) A person committing a breach of trust with a fraudulent intention or a person who hires or counsels another person to commit a breach of trust with a fraudulent intention is guilty of larceny.

(B) A person who violates the provisions of this section is guilty of a:

(1) misdemeanor triable in magistrates court or municipal court, notwithstanding the provisions of Sections 22-3-540, 22-3-545, 22-3-550, and 14-25-65, if the amount is two thousand dollars or less. Upon conviction, the person must be fined not more than one thousand dollars, or imprisoned not more than thirty days;

(2) felony and, upon conviction, must be fined in the discretion of the court or imprisoned not more than five years if the amount is more than two thousand dollars but less than ten thousand dollars;
(3) felony and, upon conviction, must be fined in the discretion of the court or imprisoned not more than ten years if the amount is ten thousand dollars or more.

Section 8-13-700 (F) In addition to the civil penalties provided for in Section 8-13-320(10)(l), a person who violates the provisions of this section is guilty of a:

(1) misdemeanor triable in magistrates court if the economic interest is one thousand dollars or less, and upon conviction, the person must be fined not more than one thousand dollars, or imprisoned not more than thirty days, or both;

(2) misdemeanor if the economic interest is more than one thousand dollars but less than ten thousand dollars, and upon conviction, the person must be fined not more th an five thousand dollars, or imprisoned not more than three years or both;

(3) felony if the economic interest is more than ten thousand dollars, and upon conviction, the person must be fined not more than ten thousand dollars, or imprisoned not more than ten years or both, and is permanently disqualified from being a public official, a public member or a public employee.

Section 8-13-720(B) In addition to the civil penalties provided for in Section 8 -13-320(10)(l), a person who violates the provisions of this section is guilty of a:

(1) misdemeanor triable in magistrates court if the amount solicited or received is one thousand dollars or less, and upon conviction, the person must be fined not more than one thousand dollars, or imprisoned not more than t hirty days, or both;

(2) misdemeanor if the amount solicited or received is more than one thousand dollars but less than ten thousand dollars, and upon conviction, the person must be fined not more than five thousand dollars, or imprisoned not more than t hree years or both;

(3) felony if the amount solicited or received is more than ten thousand dollars, and upon conviction, the person must be fined not more than ten thousand dollars, or imprisoned not more than ten years or both, and is permanently disqu alified from being a public official, a public member or a public employee.

Section 8-13-725(A)(2) In addition to the civil penalties provided for in Section 8 -13-320(10)(l), a person who violates the provisions of this section is guilty of a:

(1) misdemeanor triable in magistrates court if the economic interest is one thousand dollars or less, and upon conviction, the person must be fined not more than one thousand dollars, or imprisoned not more than thirty days, or both;

(2) misdemeanor if the econom ic interest is more than one thousand dollars but less than ten thousand dollars, and upon conviction, the person must be fined not more than five thousand dollars, or imprisoned not more than three years or both;

(3) felony if the economic interest is mo re than $10,000, and upon conviction, the person must be fined not more than ten thousand dollars, or imprisoned not more than ten years or both,

and is permanently disqualified from being a public official, a public member or a public employee.

Section 8-13-1348(F) In addition to the civil penalties provided for in Section 8-13-320(10)(l), a person who violates the provisions of this section is guilty of a:

(1) misdemeanor triable in magistrates court if the amount converted to personal use is five hundred dollars or less, and upon conviction, the person must be fined not more than one thousand dollars, or imprisoned not more than thirty days, or both;

(2) misdemeanor if the amount converted to personal use is more than five hundred dollars but less than five thousand dollars, and upon conviction, the person must be fined not more than five thousand dollars, or imprisoned not more than three years or both;

(3) felony if the amount converted to personal use is more than five thousand dollars, and upon conviction, the person must be fined not more than ten thousand dollars, or imprisoned not more than ten years or both, and is permanently disqualified from being a public official, a public member or a public employee.

APPENDIX 1

SOUTH CAROLINA ETHICS REFORM ACT DEFINITION OF "COMMITTEE"

This memorandum discusses current case law concerning the definition of "committee" in the South Carolina Ethics Act and proposes language to replace the current statutory definition, which has been held to be unconstitutional in two recent US District Court decisions.

I. *South Carolina Citizens for Life, Inc., v. Krawcheck, et al.*

The opinion in *South Carolina Citizens for Life, Inc., v. Krawcheck, et al.*, 759 F.Supp.2d 708 (D.S.C.2010) (hereinafter "*Citizens for Life*"), provides the most extensive analysis of the use of the term "committee" in state and federal election law. The case arose from the activities of the National Right to Life Committee's South Carolina affiliate, plaintiff South Carolina Citizens for Life, which had previously distributed voter guides for state government elections and intended to do so again in 2006. Prior to the 2006 general election, plaintiff sought an advisory opinion from the South Carolina Ethics Commission regarding whether it was considered a "committee" for the purposes of the South Carolina Ethics Act and therefore subject to reporting obligations and other requirements. *Id.* at 711. After being informed by the State Ethics Commission that a formal advisory opinion could not be rendered until a post-election meeting of the Commission, plaintiffs brought an action against the Commission contending, among other claims, that the term "committee" as contained in the South Carolina Ethics Act was unconstitutionally overbroad. *Id.* The case was heard by US District Judge Terry Wooten.

The South Carolina Ethics Act defines a "committee" as:

> [A]n association, a club, an organization, or a group of persons which, to influence the outcome of an elective office, receives contributions or makes expenditures in excess of five hundred dollars in the aggregate during an election cycle. It also means a person who, to influence the outcome of an elective office, makes:
>
> (a) contributions aggregating at least twenty-five thousand dollars during an election cycle to or at the request of a candidate or a committee, or a combination of them; or
>
> (b) independent expenditures aggregating five hundred dollars or more during an election cycle for the election or defeat of a candidate.

> "Committee" includes a party committee, a legislative caucus committee, a noncandidate committee, or a committee that is not a campaign committee for a candidate but that is organized for the purpose of influencing an election.
>
> S.C. Code Ann. § 8-13-1300(6).

The decision in *Citizens for Life* relies heavily upon the analysis employed in *North Carolina Right to Life v. Leake*, 525 F.3d 274 (4th Cir.2008) (hereinafter "*Leake*"), a Fourth Circuit case involving a similar challenge under North Carolina law. *Leake*, in turn, frequently references the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612 (1976) (hereinafter "*Buckley*"), a seminal decision regarding state and federal election law. It should be noted that a more recent election law decision, *Citizens United v. Federal Election Commission*, 508 U.S. 310, 130 S.Ct. 876 (2010) does not address the definition of "committee." *Citizens for Life*, 759 F.Supp.2d at 720.

Judge Wooten began his analysis of the South Carolina statutory language in *Citizens for Life* by recognizing an inherent tension in election law between legislative power to regulate elections and the guarantee of freedom of expression under the First Amendment to the US Constitution. Quoting *Buckley v. Valeo*, Judge Wooten noted that "legislatures have the well established power to regulate elections, ... and that pursuant to that power, they may establish standards that govern the financing of political campaigns." *Id.* at 714 (quoting *Buckley*, 424 US at 13, 26). He continued that the Supreme Court also was sensitive to the reality that "campaign finance restrictions 'operate in an area of the most fundamental First Amendment activities,' and thus threaten to limit ordinary 'political expression.'" *Id.* (quoting *Buckley*, 424 U.S. at 80).

Recognizing the potential burden posed by these reporting requirements, the Supreme Court delineated a "boundary between regulable election-related activity and constitutionally protected political speech." *Id.* (quoting *Leake*, 525 F.3d at 281. To preserve First Amendment rights of political expression, the Supreme Court determined in *Buckley v. Valeo* that "campaign finance laws may constitutionally regulate only those actions that are 'unambiguously related to the campaign of a particular ... candidate.'" *Id.* (quoting Buckley, 424 U.S. at 80). In the opinion of the Court, "only unambiguously campaign related communications have a sufficiently close relationship to the government's acknowledged interest in preventing corruption to be constitutionally regulable." *Id.*

Furthermore, to ensure that groups not primarily engaged in political activities were not subject to reporting requirements pursuant to the regulatory authority of the legislature, the Court in *Buckley* held that regulable political committees were only "organizations that are under the control of a candidate or ***the major purpose of which is the nomination or election of a candidate.***" *Buckley,* 424 U.S. at 80 (emphasis added). This standard has come to be

known as "the major purpose test." Under this test, political advocacy on behalf of a particular candidate must be **the** major objective of the group in question, not merely one of a number of activities in which the group is involved. In other words, "nomination or election of a candidate" must be **the** major purpose—as opposed to simply **a** major purpose—of the organization's activities in order for that group to be designated a "committee" and therefore subject to electoral law reporting requirements.

Judge Wooten further noted the application of the major purpose test from *Buckley* by the Fourth Circuit Court of Appeals in *Leake*, where the court focused on the distinction between the use of the definite article "the" versus the indefinite article "a" in analyzing the definition of "committee" under the election law of North Carolina. In *Leake*, as in *Citizens for Life*, the definition of "committee" was alleged to be unconstitutionally overbroad as well as unconstitutionally vague because it failed to incorporate the major purpose test. Under North Carolina law, a "political committee" (North Carolina's functional equivalent of a "committee" under South Carolina election law) was defined as follows:

> [A] combination of two or more individuals ... that makes or accepts anything of value to make, contributions or expenditures and has one or more of the following characteristics:
>
> a. Is controlled by a candidate;
>
> b. Is a political party or executive committee of a political party or is controlled by a political party or executive committee of a political party;
>
> c. Is created by a corporation, business entity, insurance company, labor union, or professional association pursuant to § 163–278.19(b); or
>
> d. **Has a major purpose to support or oppose the nomination or election of one or more clearly identified candidates.**

N.C. Gen.Stat. § 163–278.6(14), amended by N.C. Sess. Laws 2007–391 (emphasis added).

In analyzing the North Carolina statutory language, the Fourth Circuit determined that "in light of *Buckley's* goals, it is clear that the importance the plaintiffs attach to the definite article is correct." *Leake*, 525 F.3d at 287. The Fourth Circuit further observed that "[a] single organization can have multiple 'major purposes,' and imposing political committee burdens on a multi-faceted organization may mean that North Carolina is regulating a relatively large amount of constitutionally protected speech unrelated to elections merely to regulate a

relatively small amount of election related speech." *Id.* at 289. *See also, Colo. Right to Life Comm. Inc. v. Coffman*, 498 F.3d 1137 (10th Cir.2007), *New Mexico Youth Organized v. Herrera*, 611 F.3d 669 (10th Cir.2010), *Nat'l Right to Work Legal Defense and Educ. Found. v. Herbert*, 581 F.Supp.2d 1132 (D.Utah2008) (each applying the major purpose test to election law provisions in Colorado, New Mexico, and Utah, respectively).

Applying the major purpose test to the facts in *Citizens for Life*, Judge Wooten found the "South Carolina definition of committee contains constitutional infirmities similar to those addressed by the Fourth Circuit in *Leake*." *Citizens for Life*, 759 F.Supp.2d at 716. In distinguishing between the North Carolina and South Carolina statutory language, Judge Wooten observed that "[w]hile the State of North Carolina attempted to incorporate a form of *Buckley's* major purpose test into its definition of political committee, the South Carolina Ethics Act creates committee restrictions without any reference to an entity's major purpose. *Id.* He further noted that "an entity that spends several million dollars annually on issue advocacy or community outreach can be required to register as a committee under South Carolina law if the group decides to spend five hundred and one dollars on a campaign related communication. Without the incorporation of the 'major purpose test' into the statute, this result is inconsistent with both *Buckley* and *Leake*." *Id.* Accordingly, Judge Wooten granted plaintiff South Carolina Citizens for Life's motion for summary judgment and declared the definition of "committee" in the South Carolina Ethics Act to be unconstitutionally overbroad. *Id.* at 720.

II. *South Carolinians for Responsible Government v. Krawcheck, et al.*

In a related case, *South Carolinians for Responsible Government v. Krawcheck, et al.*, 854 F.Supp.2d 336 (D.S.C.2012), Judge Margaret Seymour reached the same conclusion as Judge Wooten in *Citizens for Life*. Regarding the definition of "committee" in the South Carolina Ethics Act, Judge Seymour held, "on its face, this definition does not relate to an organization's 'major purpose,' nor does it tie the Ethics Code's regulations to an organization's main goal, conduct or functions." *Id.* at 343.

III. Conclusion and Suggested Revision

Following the decision in *Leake*, North Carolina election law was changed to reflect the shift from the indefinite article to the definite article in the definition of a committee (*i.e.* from "a major purpose" to "the major purpose"). The revised language defines a "political committee" as follows:

> (14) The term "political committee" means a combination of two or more individuals, such as any person, committee, association, organization, or other entity that makes, or accepts anything of value

> to make, contributions or expenditures and has one or more of the following characteristics:
>
> a. Is controlled by a candidate;
>
> b. Is a political party or executive committee of a political party or is controlled by a political party or executive committee of a political party;
> c. Is created by a corporation, business entity, insurance company, labor union, or professional association pursuant to G.S. 163-278.19(b); or
>
> d. Has ***the*** major purpose to support or oppose the nomination or election of one or more clearly identified candidates.
>
> Supporting or opposing the election of clearly identified candidates includes supporting or opposing the candidates of a clearly identified political party.
>
> If the entity qualifies as a "political committee" under sub-subdivision a., b., c., or d. of this subdivision, it continues to be a political committee if it receives contributions or makes expenditures or maintains assets or liabilities. A political committee ceases to exist when it winds up its operations, disposes of its assets, and files its final report.
>
> The term "political committee" includes the campaign of a candidate who serves as his or her own treasurer.
>
> Special definitions of "political action committee" and "candidate campaign committee" that apply only in Part 1A of this Article are set forth in G.S. 163-278.38Z.

NC Code § 163-278.6 (emphasis added).

The current definition of "committee" in the South Carolina Ethics Act has been held to be unconstitutional by two federal judges because it fails to incorporate the major purpose test first articulated in *Buckley* and most recently endorsed in *Leake*. As the revised North Carolina language appears to address the Fourth Circuit's concerns in *Leake*, a similar change is suggested, consistent with all other provisions of the South Carolina Ethics Act, to bring South Carolina election law's definition of "committee" into conformity with the constitutional requirements expressed in *Buckley* and reaffirmed in *Leake*.

APPENDIX 2

SEPARATION OF POWERS AND STATE ETHICS COMMISSION JURISDICTION

Statutory Provisions

The State Ethics Commission is established in Section 8-13-310 (A) of the South Carolina Code of Laws. The commission is defined as the "appropriate supervisory office" for all individuals required to file ethics-related disclosure forms "except for those members of or candidates for the office of State Senator or State Representative." (S.C. Code Ann. Section 8-13-100(2)(a)). Similar exceptions exist with respect to the investigative powers of the commission. The commission may "initiate or receive complaints and make investigations" of any "public official, public member, or public employee" consistent with its statutory jurisdiction "except [for] members or staff, including staff elected to serve as officers of or candidates for the General Assembly unless otherwise provided for under House or Senate rules." (Section 8-13-320(9)).

The same Section of the South Carolina Code that establishes the State Ethics Commission further delineates the legislative exception by explicitly creating a "House of Representatives Legislative Ethics Committee and a Senate Legislative Ethics Committee." (Section 8-13-510). Each legislative committee has the power to determine compliance with disclosure requirements and to receive complaints of and investigate

> possible violations of breach of a privilege governing a member or staff of the appropriate house, the alleged breach of a rule governing a member of, legislative caucus committees for, or a candidate, or staff for the appropriate house, misconduct of a member or staff of, legislative caucus committees for, or a candidate for the appropriate house, or violation of [South Carolina law relating to ethics and lobbying]. (Section 8-13-530(3)).

Separation of Powers

As the South Carolina Constitution is silent on the issue of ethics oversight, there is a question as to whether a constitutional change would be necessary to remove the legislative exception to the jurisdiction of the South Carolina Ethics Commission. Article I, Section 8 of the South Carolina Constitution reads:

> In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.

Article III, Section 1 of the South Carolina Constitution vests legislative power in two houses, "one to be styled the 'Senate' and the other to be styled the 'House of Representatives,' and both together the 'General Assembly of the State of South Carolina.'"

To facilitate the exercise of legislative power, Section 12 of Article III permits each house of to adopt its own procedural rules and "punish its members for disorderly behavior...." This language and the placement of the section immediately following seem to indicate specific conditions in which punishment may be warranted. Article III, Section 13, which concerns punishment of non-legislators, grants legislative authority to imprison persons not members of either house. Those at risk of legislative arrest and imprisonment are:

> any person not a member who shall be guilty of disrespect to the house by any disorderly or contemptuous behavior in its presence, or who, during the time of its sitting, shall threaten harm to the body or estate of any member for anything said or done in either house, or who shall assault any of them therefor, or who shall assault or arrest any witness or other person ordered to attend the house in his going thereto or returning therefrom, or who shall rescue any person arrested by order of the house: Provided, That such time of imprisonment shall not in any case extend beyond the session of the General Assembly. (Art. III, Sec. 13)

The purpose of legislative arrest appears to be to prevent disruption of legislative business. Reading the two sections together, the power to punish both members and non-members appears to be linked to the actual operation of the legislative branch. The sections mention only urgent impediments to the smooth functioning of legislative business such as "disorderly behavior" and threats of "assault or arrest." Neither punitive section appears to contemplate a role for sanctioning conduct not immediately threatening to legislative proceedings. Further, a later section concerning the removal of legislative officers states that legislators "shall be removed for incapacity, misconduct or neglect of duty, *in such manner as may be provided by law*, when no mode of trial or removal is provided in this Constitution." (Art. III, Sec. 27, emphasis added) Indeed, even the section of the code establishing the three ethics bodies indicates that waiver of the legislative exception may be accomplished by House or Senate rule (*See* Section 8-13-320(9), exempting legislative staff, members, and candidates from State Ethics Commission investigations "unless otherwise provided for under House or Senate rules.")

Conclusion

All bodies charged with investigating and punishing unethical conduct by public officials in South Carolina are statutorily created. If each body in the General Assembly possessed inherent state constitutional authority to investigate and sanction unethical behavior among its

members as a consequence of separation of powers and its ability to punish "disorderly behavior," statutory provisions for legislative ethics committees would be unnecessary. As all ethics bodies are created by statute, any modifications to their operation may be accomplished by amending the relevant section(s) of the South Carolina Code. Bills were introduced during the 2011-2012 legislative session in both the Senate and the House of Representatives to bring the legislative branch within the jurisdiction of the State Ethics Commission (*See* H. 4421 and S. 1373). Neither bill made it out of committee.

Nevertheless, extra-legislative ethics oversight is not unusual in other parts of the country. A majority of states have brought members of the legislature under the jurisdiction of a state ethics commission. Of the 40 states with state ethics commissions (of which South Carolina is one), 33 have assigned their commissions jurisdiction over the legislative branch. South Carolina is one of six states that have not granted this expanded jurisdiction.

In conclusion, a constitutional amendment is not required to allow the State Ethics Commission to subsume the jurisdiction of the Senate and House Legislative Ethics Committees. A change to existing statute would be consistent with the manner in which all of the bodies were created and would pose no threat to the separation of powers, as the punitive authority vested in the legislature appears to be in service of maintaining the core legislative function.

SEPARATION OF POWERS IN *STATE v. GREGORIO*

The New Jersey case, *State v. Gregorio*, 186 N.J. Super. 138, 451 A.2d 980 (1982), addresses issues raised by non-legislative prosecution of ethics violations as possible violations of the separation of powers doctrine and legislative rule-making authority. In this matter, a grand jury indicted New Jersey State Senator John T. Gregorio, alleging failure to report income received from two bars in financial disclosure statements he filed with the Joint Legislative Committee on Ethical Standards. Senator Gregorio submitted these reports pursuant to the code of ethics adopted by both houses of the New Jersey State Legislature in a joint resolution under the Conflicts of Interest Law, N.J. Stat. Ann. § 52:13D-12 *et seq.* The State also contended that Gregorio's failure to disclose violated the law against tampering with public records or information, N.J. Stat. Ann. § 2C:28-7.

Gregorio moved to dismiss the charges on the grounds that the prosecution in state court violated the separation of powers clause or free speech or debate clause of the New Jersey Constitution. The New Jersey State Legislature argued as *amicus curiae* that the requirement of financial disclosure statements constitutes a legislative rule beyond the power of the executive branch to enforce and outside the jurisdiction of the judiciary branch. The court rejected all of these arguments and denied the motion to dismiss, holding that the prosecution was not precluded by the separation of powers doctrine or free speech or debate clauses of the

Constitution, or as an unlawful arrogation of power by the executive branch. The separation of powers and rule-making authority issues are discussed separately below.

Issue 1: Separation of Powers, Generally

The court in *Gregorio* considered separation of powers language very similar to that contained in the South Carolina Constitution. The New Jersey language reads:

> The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution. N.J. Const. art. III, ¶ 1.

By comparison, the South Carolina Constitution provides:

> In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other. S.C. Const. art. I, § 8.

The New Jersey Superior Court held that the separation of powers doctrine does not bar prosecution. The relevant parts of the decision are included below:

> [I]t can hardly be argued that the application of criminal penalties for willfully providing false information impairs any of the procedures adopted by our Legislature to implement the statutory mandate. To the contrary, criminal prosecution in such a case plainly advances the legislative goal. *Gregorio* at 984.
>
> To accept defendant's theory, one must subscribe to the view that the Legislature intended to make its members super-citizens shielded from criminal prosecution by sheer virtue of their public office... Such a result is at odds with logic, contrary to public policy, and would constitute a perversion of the legislative objective to foster the "respect and confidence of the people" in our representative form of government. *Gregorio* at 985.

Issue 2: Rule-Making Authority

Addressing the issue of whether legislative rule-making authority precluded additional punitive measures by other branches of government, the New Jersey Superior Court considered constitutional language almost identical to provisions in the South Carolina Constitution. The New Jersey language reads as follows:

> Each house shall choose its own officers, determine the rules of its proceedings, and punish its members for disorderly behavior. It may expel a member with the concurrence of two-thirds of all its members. N.J. Const. art. IV, § 4, ¶ 3.

Legislative rule-making authority is granted in the following section of the South Carolina Constitution:

> Each house shall choose its own officers, determine its rules of procedure, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member, but not a second time for the same cause. S.C. Const. art. III, § 12.

As with the separation of powers doctrine, the New Jersey court held that rule-making authority does not bar prosecution. Again, the relevant parts of the decision are excerpted below:

> [T]he requirement that financial disclosure statements be filed with the joint committee were adopted pursuant to the Conflicts of Interest Law, not by virtue of the constitutional authority of the Legislature to make rules and punish members for disorderly behavior. The constitutional rule-making power of the Legislature is generally exercised in the context of establishing standards to provide for the orderly and efficient conduct of legislative proceedings.... The code of ethics provision requiring the filing of financial statements stands upon an entirely different footing.... [T]he Legislature made a clear procedural election when it adopted a code of ethics and characterized it as an agency rule. It cannot be said that the code was adopted pursuant to a power demonstrably committed to the Legislative Branch of government by the text of the Constitution. Simply stated, it was adopted pursuant to the Conflict of Interest Law, not by virtue of a rule promulgated pursuant to the constitutional responsibility of the Legislature to establish its own procedures. *Gregorio* at 988-89.

APPENDIX 3

STATE ETHICS COMMISSION FUNDING OPTIONS

Two general approaches—or combinations thereof—merit consideration with regard to ensuring sufficient commission resources. First, commission funding could be set at a fixed percentage of a larger budget or even a specific amount. The percentage or amount would reflect a determination of how much funding the commission requires to fulfill its charge. This approach would isolate the commission budget from retaliatory reductions and ensure adequate operating capital. If funded on a percentage basis, the commission could be funded either by a fixed percentage of the annual appropriation of the entity in which it is housed (such as the office of the attorney general or the judicial or executive branch, if appropriate) or a percentage of the overall budget.

Second, procedural measures may be implemented with respect to adjusting commission funding. These measures would shield the commission's budget to some degree from political influence. For example, there could be a requirement for a supermajority in one or both legislative houses in order to reduce the annual appropriation. Another option would be to require both executive and legislative branches to affirmatively endorse the commission's appropriation, *i.e.* actual assent from both branches, eliminating the possibility of an overridden veto.

While each of these approaches has been used both in other states and countries to secure funding for the judicial branch, there is less data available on their use in state ethics commissions' appropriations. Two examples from Alabama and Indiana are worth noting. Alabama recently enacted legislation (Act 2011 - 259) designating 0.1% of the State General Funds Appropriations Act to fund the activities of the State Ethics Commission. This appropriation currently amounts to $1,784,000.00. Funding can be reduced only by 2/3 approval of both houses of the state legislature. Indiana allocates 25% of the Inspector General's budget to fund operating expenses of the State Ethics Commission. The current overall budget for the commission is $369,408.00.

This concludes the Commission's report.