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May 8, 2009

Mr. Rick Thompson  
Executive Secretary  
State Ethics Commission  
200 Piedmont Avenue  
Suite 1416 – West Tower  
Atlanta, GA 30334

Dear Mr. Thompson:

The undersigned is counsel to Insurance Commissioner John Oxendine's campaign committee, John Oxendine Working for Georgia. Please accept this correspondence as a request, pursuant to O.C.G.A. § 21-5-6(b)(13), for an Advisory Opinion from the Commission on the fact patterns below.

As you are aware, John Oxendine currently serves the citizens of the State of Georgia as their Insurance Commissioner. Commissioner Oxendine also serves as the Georgia Safety Fire Commissioner, Industrial Loan Commissioner, and Comptroller General (collectively, "Office of the Commissioner"). Through these various roles, Commissioner Oxendine's duties include regulating approximately 1,600 insurance companies, licensing 137,000 insurance agents, and regulating over 1,000 industrial loan offices (companies that make loans of \$3,000 or less).

Commissioner Oxendine has announced his candidacy for the Office of Governor of the State of Georgia. Since this announcement, numerous companies and entities have approached Commissioner Oxendine's campaign staff with offers to make campaign contributions. While John Oxendine Working for Georgia would like to accept such contributions, the campaign faces uncertainty under the law regarding the precise scope of entities from which he may accept campaign contributions and still remain in compliance with the standards set forth in the Georgia Ethics in Government Act ("the Act") pertaining to contributions by regulated entities. Accordingly, John Oxendine Working for Georgia seeks guidance on the issues detailed below.

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**I. O.C.G.A. § 21-5-30.1 AND PAST JUDICIAL, ATTORNEY GENERAL AND COMMISSION INTERPRETATION**

Relevant to this inquiry, the Act states that “[n]o regulated entity and no person or political action committee acting on behalf of a regulated entity shall make a contribution to or on behalf of a person holding office as an elected executive officer regulating such entity or to or on behalf of a candidate for the office of an elected executive officer regulating such entity or to or on behalf of a campaign committee of any such candidate.” O.C.G.A. § 21-5-30.1(b).

In this context, O.C.G.A. § 21-5-30.1(a)(5) defines a “regulated entity” as “any person who is required by law to be licensed by an elected executive officer or a board under the jurisdiction of an elected executive officer...or any person who engages in a business or profession which is regulated by an elected executive officer or by a board under the jurisdiction of an elected executive officer.” The law is unclear, however, as to the application of this definition to various entities, their parent and subsidiary organizations, and sister organizations which are not directly licensed by the Office of the Commissioner.

Georgia law, and official opinions interpreting it, place limits on the broad language of O.C.G.A. § 21-5-30.1(b) by making clear that individual employees of regulated entities may make contributions to elected executive officers that regulate their employers, so long as the employees’ contributions are voluntary and are made from personal funds. See e.g. O.C.G.A. § 21-5-30.1(d). Limitations such as the ones set forth by O.C.G.A. § 21-5-30.1(d) are critical to the validity of O.C.G.A. § 21-5-30.1(b), because the statute is a restriction on First Amendment political speech and political expression rights. As such, the statute must be narrowly tailored to serve a compelling state interest. Gwinn v. State Ethics Comm., 262 Ga. 855, 856-57 (1993). In Gwinn, the Supreme Court upheld the validity of O.C.G.A. § 21-5-30.1(b) in so far as the statute prohibits a regulated entity from contributing to the holder of the office which oversees the regulation of the entity. Id. at 857. Specifically, the Court stated that, “[i]nasmuch as the regulated entity is free to contribute to all other political campaigns, we conclude that O.C.G.A. § 21-5-30.1(b) is narrowly tailored to meet the threat of the democratic process perceived by the General Assembly.” Id.

Perhaps the only common thread amongst the Attorney General’s Opinions that have analyzed fact scenarios under O.C.G.A. § 21-5-30.1(b) is an acknowledgement that the statute must be interpreted narrowly. For instance, 1990 Op. Atty. Gen. U90-19 confirmed that employees of an industrial loan licensee or insurer may make voluntary contributions to the Commissioner, and that non-lobbyist employees may even solicit voluntary contributions for the Commissioner from third parties and fellow employees, so long as the contributions are entirely voluntary.

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Similarly, 1998 Op. Atty. Gen. 98-4 clarified that all corporations are not prohibited from making contributions to the Secretary of State pursuant to O.C.G.A. § 21-5-30.1(b), despite the fact that all corporations are required to register with, and make certain reports to, the Secretary of State. The reason that O.C.G.A. § 21-5-30.1(b) was limited in this manner was because "the Secretary of State's powers regarding business corporations are essentially administrative and ministerial. The authority of the Secretary of State is most aptly described as relating to the corporate existence of these business entities, but not to the particular sector of the economy, i.e. the kind of 'business' engaged in by the entity." In sum, the Opinion stated that though all corporations register with the Secretary of State, most corporations are not specifically within the Secretary of State's "jurisdiction" in the context of O.C.G.A. § 21-5-30.1.

1998 Op. Atty. Gen. 98-4 also set forth that examining boards that issue licenses are prohibited from making contributions to the Secretary of State pursuant to O.C.G.A. § 21-5-30.1(b), because unlike corporations, the Secretary of State's "sphere of influence and authority relative to the examining boards is considerable." 1998 Op. Atty. Gen. No. 98-11 subsequently made clear that this prohibition on contributions from examining boards to the Secretary of State did not apply to individuals holding licenses from examining boards. In so doing, the Opinion emphasized the importance of narrowly interpreting O.C.G.A. § 21-5-30.1(b) due to Constitutional concerns.

The final Attorney General's Opinion regarding O.C.G.A. § 21-5-30.1(b) is 1994 Op. Atty. Gen. No. 94-20, where it was determined that any company or group which has obtained a certificate of authority to operate a self-insurance program from the Commissioner is a "regulated entity" that may not contribute to the Commissioner. However, the Opinion also made clear that companies that are not insurance companies, but which provide services similar to insurance, (such as that provided by motor clubs) are not "regulated entities" that are prohibited from making contributions, because such entities do not receive a license from the Commissioner and are not otherwise regulated by the Commissioner.

Similarly, the Commission has issued numerous Advisory Opinions which limit the scope of O.C.G.A. § 21-5-30(f), which prohibits a person acting on behalf of a public utility corporation regulated by the Public Service Commission ("PSC") from making contributions to political campaigns, and makes it a felony for any person to knowingly make political contributions to a member of the PSC, a candidate for the PSC, or the campaign committee of a candidate for the PSC. For instance, in Advisory Opinion No. 2008-01, the Commission stated that the Georgia Utility Contractors Association ("GUCA") PAC, member companies of the GUCA, and employees of the member companies, could contribute to a candidate for the PSC so long as such entities were not acting on behalf of a public utility regulated by the PSC. In Advisory Opinion No. 1999-30, the Commission stated, in part, that individuals affiliated with a business entity which has members that are PSC regulated public utility corporations could lawfully establish a PAC, so long as the PAC received no assistance from the PSC regulated public utility corporations. Finally, in Advisory Opinion No. 1991-26, the Commission stated

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that a private carrier over whom the PSC's authority is limited to safety matters could make political contributions because the private carriers are not subject to the general supervision of the PSC.

## **II. APPLICATION OF THE LAW AND PAST GUIDANCE TO THE INSURANCE AND SAFETY FIRE COMMISSIONER**

While these Opinions do clarify some basic principles relating to the application of O.C.G.A. § 21-5-30.1(b), significant ambiguities clearly still remain. This is particularly true as it applies to the Office of the Commissioner, which like the Secretary of State, has a broad range of responsibilities, specifically in relation to Fire Protection and Safety under Title 25 of the Georgia Code, and Insurance under Title 33 of the Georgia Code.

It is apparent from the language of O.C.G.A. § 21-5-30.1(b), and the Opinions above, that insurance companies that have obtained certificates of authority from the Commissioner may not make contributions to the Commissioner. It is similarly clear that employees of such insurance companies may voluntarily contribute their personal funds, and that non-lobbyist employees of such insurance companies may solicit even their co-workers for contributions to the Commissioner. Of course, corporations or other "persons" that are not regulated by the Commissioner are also permitted to contribute to the Commissioner.

However, there are a number of scenarios that do not fit squarely within the boundaries, precedent, and guidance described above. These scenarios fall within two general categories: (1) whether parent, subsidiary, related, commonly owned, and sibling companies to regulated entities are prohibited from contributing and, if so, what the legal standards are to be applied in determining whether an entity is sufficiently related to the regulated entity to warrant imposition of the restrictions of the Act; and (2) whether all of the various entities requiring some form of documentation from Office of the Commissioner are sufficiently within the Commissioner's "sphere of regulation" to warrant imposition of the restrictions of the Act. Accordingly, we request that you answer the following questions:

### **A. Requests for Guidance Pertaining to Corporate Form**

**Request 1(a):** Does O.C.G.A. § 21-5-30.1 prohibit the parent company of a "regulated entity" that is regulated by the Commissioner from contributing to a campaign committee of the Commissioner even if that parent company itself is not subject to the Commissioner's jurisdiction, and even though the parent company does not have direct control of the regulated entity?

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(b) If so, what are the boundaries and limitations to this restriction? Does the restriction apply only to parent companies doing business in the State of Georgia? Do the boundaries apply regardless of the existence, or non-existence, of common ownership, board members, or officers?

**Request 2(a):** Does O.C.G.A. § 21-5-30.1 prohibit the subsidiary of a "regulated entity" that is regulated by the Commissioner from contributing to a campaign committee of the Commissioner even if that subsidiary itself is not subject to the Commissioner's jurisdiction, and even though the subsidiary has no control over the regulated entity?

(b) If so, what are the boundaries and limitations to this restriction? Does the restriction apply only to subsidiary companies doing business in the State of Georgia? Do the boundaries apply regardless of the existence, or non-existence, of common ownership, board members, or officers?

**Request 3(a):** Does O.C.G.A. § 21-5-30.1 prohibit an affiliate or sister company of a "regulated entity" that is regulated by the Commissioner from contributing to a campaign committee of the Commissioner even if that affiliate itself is not subject to the Commissioner's jurisdiction, and even though the affiliate has no control over the regulated entity?

(b) If so, what are the boundaries and limitations to this restriction? Does the restriction apply only to sibling companies doing business in the State of Georgia? Do the boundaries apply regardless of the existence, or non-existence, of common ownership, board members, or officers?

**Request 4:** Does O.C.G.A. § 21-5-30.1 prohibit a holding company with an interest in a "regulated entity" from contributing to a campaign committee of the Commissioner even if that holding company itself is not subject to the Commissioner's jurisdiction, and even though the holding company does not have direct control over the regulated entity?

**Request 5:** Does O.C.G.A. § 21-5-30.1 prohibit a company sharing common ownership with a "regulated entity" from contributing to a campaign committee of the Commissioner even if that commonly owned company itself is not subject to the Commissioner's jurisdiction, and even though the commonly owned company does not have direct control over the regulated entity?

**Request 6:** Does O.C.G.A. § 21-5-30.1 prohibit a political action committee which receives contributions from a "regulated entity" from contributing to a campaign committee of the Commissioner, even if: 1) the political action committee does not make the contribution on behalf of the "regulated entity;" and 2) the "regulated entity" has no direction or control over the political action committee's contributions?

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**B. Requests for Guidance Pertaining to Entities Interacting with the Georgia Commissioner of Insurance and Safety Fire**

John Oxendine Working for Georgia also requests guidance pertaining to the Act as applied specifically to the Office of the Commissioner. As you know, the Office of the Commissioner has statutory duties extending well beyond the regulation of chartered insurance companies. For example, as a direct result of the 1946 Winecoff Hotel fire in which 119 people lost their lives, the General Assembly enacted legislation relating to fire safety in public buildings and assigned the responsibility for executing the law to the Office of the Commissioner, who was named ex-officio Safety Fire Commissioner. The law further authorized the appointment of a State Fire Marshal and the creation of the State Fire Marshal's Office. The responsibilities of the Fire Marshal's Office fall into five main categories: building inspection, manufactured housing inspection, engineering, hazardous materials inspections, and licensing. Through this office, the Georgia State Fire Marshal issues licenses to traveling carnivals and circuses, issues Certificates of Competency; and issues inspectors license to fire sprinkler contractors. Companies and personnel which install, inspect, recharge, repair, service and/or test portable fire extinguishers or fire suppression systems are also licensed and permitted through the Safety Fire Division. The Georgia State Fire Marshal also regulates and licenses racetrack venues in the state of Georgia.

Moreover, through a contract between the Office of the Commissioner and the Commissioner of the Georgia Department of Human Resources, the Office of the State Fire Marshal conducts federally required Life Safety Code (LSC) inspections in Non-JCAH Hospitals, Nursing Homes, Ambulatory Surgical Centers, Hospice, Intermediate Care Facilities/Mental Retardation, that are providers of the Centers for Medicare and /or Medicaid Services Program. Several Types of federal inspections are requested and conducted by the HHS Section which include initial certification, recertification, complaint, investigation monitoring (fire and compliance), follow up visits, validation surveys and critical access hospitals certification.

The State Fire Marshal regulates the storage, transportation and handling of various hazardous materials. Licenses are issued annually for control of explosives, liquefied petroleum gas, and fireworks manufacturing facilities. Permits are issued for control of anhydrous ammonia and self-service dispensing of motor fuels. In addition, during the 2004 General Assembly, legislation was passed with changes to the Uniform Standards Code for Manufactured Homes Act. Among other provisions, the new law increases the annual license fee for manufacturers, retailers and installers and requires installers to purchase a permit from the Office of the Commissioner for each new or pre-owned manufactured home installed in Georgia.

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**Request 7:** Does O.C.G.A. § 21-5-30.1 prohibit each and every entity that is required to obtain a permit of any sort from the Commissioner from contributing to a campaign committee of the Commissioner or is the restriction imposed by law limited to entities actually licensed by the Office of the Commissioner? What tests or restrictions should the John Oxendine Working for Georgia campaign employ when determining whether to accept a contribution from an entity subject to oversight or inspection by the Office of the Commissioner?

**Request 8:** If the Commissioner's powers regarding an entity's business are primarily administrative and ministerial, may the entity make a contribution to a campaign committee of the Commissioner under O.C.G.A. § 21-5-30.1? If so, what tests or guidance are available to the John Oxendine Working for Georgia Campaign in determining whether the Commissioner's powers something more than administrative and ministerial in the context of O.C.G.A. § 21-5-30.1?

Thank you very much for your prompt and thorough attention to this matter. Please do not hesitate to contact me at any time if I can provide additional context or information in connection with these requests.

Very truly yours,

*Stefan C. Passantino*  
Stefan C. Passantino *w/ express permission*