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OPINION COMMITTEE

State Board of Education

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FILE # ML-46675-11

I.D. # 46675

RQ-0948-BA



March 2, 2011

The Honorable Greg Abbott
Attorney General of Texas
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

Re: Construction of Section 7.103(c) of the Texas Education Code

Dear General Abbott:

I am writing to seek your guidance regarding Section 7.103(c) of the Texas Education Code as it relates to eligibility to serve on the Texas State Board of Education ("Board"). As you know, Subsection 7.103(c) provides that a person "may not serve as a member of the board" if that person is subject to registration as a lobbyist "by virtue of the person's activities for compensation in or on behalf of a profession, business or association related to the operation of the board."

Current Section 7.103 of the Education Code was adopted in 1984 as part of a comprehensive revision of education statutes¹. We have been unable to find any construction of this statute, but understand that similar language was added to the requirements of other boards during that time².

By adopting Section 7.103(c), the Legislature did not choose to completely prohibit all individuals who are required to register as lobbyists from serving on the Board³. My questions involve what types of activities would trigger the prohibition under Section 7.103(c) and thus prohibit such person from serving on the Board.

My first question involves the phrase "related to the operation of the board." It appears unclear whether "related to" refers to the actions of the member or activities of the lobby client. It is possible that a member could be registered as a lobbyist

¹ Acts, 1984, 68th Leg., 2nd C.S. Ch28, art. I, part B, section 2, adding Subsection 11.22(l) to the Education Code, which was recodified in 1995 as Section 7.103(c). The general revision is often referred to as "House Bill 72".

² E.g., Art. 581-2-1 (State Securities Board), Government Code 403.492(d) (Texas Board of Criminal Justice), Occupations Code 252.003(d) (Board of Dental Examiners), etc. Attorney General's Opinion DM-151(1992) construed a somewhat different provision applicable to the Texas General Services Commission, determining that the prohibition applied only to the individual board member and not to all members of a lobby firm.

³ "Any constitutional or statutory provision which restricts the right to hold public office should be strictly construed against ineligibility." *Willis v. Potts*, 377 S.W.2nd 622 (Tex. 1964).

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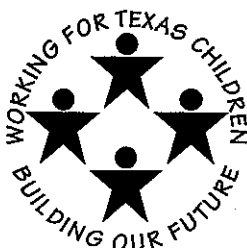
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and representing an entity that might have an interest in some aspect of the Board's activities, but not represent the entity in matters before the Board. For example, a member might contractually restrict lobbying activities to legislative matters and not advocate in any way before the Board itself. The lobby client could also define the duties of multiple lobbyists in such a way as to exclude the "operations of the board" from the scope of engagement of a lobbyist-member.

Alternatively, "related to" could be read to mean that if any activity of the lobby client is related to the operation of the Board, the member could not serve or could not retain that lobby client. My first question is whether the applicability of Section 7.103(c) should be viewed from the perspective of the board member (i.e., does the board member engage in lobbying activities that relate to the operation of the board), or the lobby client (i.e., does the business or other activities of the lobby client relate to the operation of the board).

My next questions involve the phrase "operation of the board" in light of specific responsibilities the Board has under the Texas Constitution and state statutes.

Article VII, section 5(f) of the Texas Constitution authorizes the Board to make "any kind of investment" on behalf of the Permanent School Fund ("PSF"). The PSF has largely been invested in equities and bonds, but over the past five years has begun to diversify into hedge funds, real estate, and other types of investments. The Board does not select individual investments such as specific stocks or bonds, but has, with the advice of the Texas Education Agency ("TEA") staff and external consultants, invested in stock indices, and defined asset classes by hiring managers who are expected to meet certain benchmark performance levels or to match broad indices of equity performance⁴. It is possible that the actions of the Board could have an impact on the value of a client of a registered lobbyist Board member. For example, a decision by the Board might alter its asset mix in a way that would have the effect of increasing or decreasing the PSF's investment in the client company. Is Section 7.103(c) triggered by a PSF investment in a company or other asset if the investment (e.g., a share of stock or corporate bond) is an interest in a company represented by a Board member as a lobbyist, but the Board has no role in selecting the individual investment?

A related question involves investment consultants and managers hired by the Board to invest funds of the PSF. While an applicant to provide investment or management services would appear to be involved in the "operation of the board" by submitting its application, an investment manager may purchase equipment or services from other business entities that have no direct relationship with the Board. For example, an investment manager could subscribe to an information service, contract for brokerage services or purchase business equipment or software from a company that is otherwise represented by a member as a lobbyist. Is Section 7.103(c) triggered if a subcontractor or supplier of an investment manager is otherwise represented by an SBOE member as a lobbyist?

The Board is charged with adopting a state curriculum of "Texas Essential Knowledge and Skills" ("TEKS"), which define the subjects and courses that are required to be taught in Texas

⁴ Texas Education Agency staff also manages some asset classes under similar direction from the Board.

public schools⁵. It is possible that a "profession, business or association" represented by a Board member could be mentioned in the TEKS. For example, a particular organization like the Red Cross or profession like the medical or legal professions could be discussed in social studies TEKS. Is Section 7.103(c) triggered if a "profession, business, or association" is mentioned or discussed in the TEKS and otherwise represented by an SBOE member as a lobbyist?

The Board also has a statutory duty to adopt textbooks under Chapter 31 of the Education Code. Note that the statutory definition of "textbook" includes "electronic textbooks," which has broadened the potential applicants for state textbook contracts to companies such as computer hardware and software companies. Textbook publishers submit proposed textbooks covering the state curriculum and the Board votes to adopt textbooks for purchase at state expense.

While a textbook publisher would appear to be involved in the "operation of the board" by submitting its textbook for consideration, a publisher may purchase component parts of a textbook from other business entities that have no direct relationship with the Board. For example, an author could be hired or paid a royalty for writing a textbook, a paper company could sell the physical components of a textbook, or a software company could provide the operating system for an electronic textbook. Is Section 7.103(c) triggered if a contractor or supplier of a textbook publisher is otherwise represented by an SBOE member as a lobbyist?

A similar question might arise involving charters granted by the Board⁶. An applicant for a charter would appear to be "involved in the operation of the board," by virtue of the application itself. However, the application could refer to, or the operations of a charter school could involve, purchases or services from a business incidentally represented by a Board member as a lobbyist. Is Section 7.103(c) triggered if a contractor, or supplier of a charter school or applicant for a charter is otherwise represented by a Board member as a lobbyist?

It is also possible that a lobby client of a Board member could take a position on a matter before the Board. Examples would include testifying before the Board on a particular matter under consideration or otherwise communicating with the Board about a matter within its authority. Is Section 7.103(c) triggered if an entity represented by an SBOE member as a lobbyist takes a public position on a matter pending before or within the authority of the Board?

The Board is a separate legal entity from the Texas Education Agency and the Commissioner of Education (collectively, the "TEA")⁷, but cooperates in many aspects of public education. The TEA is charged with implementing policy decisions made by the Board with its own staff and

⁵ See, Section 28.002, Texas Education Code.

⁶ The Board takes applications and grants charters to nonprofit corporations or certain institutions of higher education under Subchapters D and E, respectively, of Chapter 12 of the Texas Education Code. A charter authorizes the recipient to operate a Texas public school and receive state funding for that purpose.

⁷ Pursuant to Sections 7.002 and 7.054(b)(2) of the Education Code, the Commissioner of Education is essentially identical to the Texas Education Agency. Prior to 1995, the Commissioner, Board and Agency comprised one entity known as the Central Education Agency. As part of a comprehensive revision of the Education Code, the Central Education Agency was abolished and the Commissioner, Agency and Board recognized as separate entities. See, Acts, Acts 1995, 74th Leg., ch 260. Section 80 of that act provides that "a reference in law to the Central Education Agency means the Texas Education Agency."

budget⁸. For example, the TEA is charged with processing orders for textbooks selected by the Board⁹.

The TEA also directly administers a number of educational programs under statutes conferring authority on the TEA and not the Board. For example, the TEA administers the state testing program under Section 39.023 of the Education Code and contracts for different aspects of test development and grading. Is Section 7.103(c) triggered if an entity represented by a Board member as a lobbyist contracts with or participates in activities of the TEA? Please address in this regard the status of an applicant for a grant awarded by the TEA.

Finally, I would appreciate your advice as to the ability, if any, of a member of the Board to cure a violation of subsection 7.103(c). The statute is written as an absolute ("may not serve"), but there appears to be no mechanism for enforcement. As the questions in this request illustrate, numerous responsibilities of the Board could potentially coincide with activities of a lobby client of a Board member¹⁰. If a Board member discovers that a lobby client has in some way become involved in the "operation of the Board," may the member cure that by recusal, by terminating the lobby relationship, or by some other means?

Thank you for your consideration of this request. Should you need any additional information, please feel free to contact me or David Anderson, TEA General Counsel, at (512) 463-9720.

Sincerely,



Gail Lowe
Chair, Texas State Board of Education

cc: Robert Scott, Commissioner of Education, Texas Education Agency
Members, State Board of Education

⁸ The Board has not since 1995 been directly appropriated funds. All state employees implementing Board programs are employees of the Agency. The Board does not have authority over the Agency budget or personnel decisions.

⁹ The Board acts to adopt textbooks under Section 31.024 of the Education Code, while districts are required to place orders with the Commissioner under Section 31.103.

¹⁰ Your office has previously considered a statute (currently Section 7.108 of the Education Code) prohibiting certain individuals from participating in Board campaigns, finding it to be in part unconstitutionally vague. While Opinion M-1262 (1972) involved a penal statute, it may be relevant to consideration of Section 7.103.