



HENRY McMASTER  
ATTORNEY GENERAL

September 6, 2006

Janie A. Davis, Executive Director  
Commission for Minority Affairs  
6904 North Main Street, Suite 107  
Columbia, South Carolina 29203

Dear Ms. Davis:

We issue this opinion in response to your letter requesting an opinion as to whether the Commission for Minority Affairs (the "Commission") is regulatory agency for purposes of section 8-13-730 of the South Carolina Code. You provided us with the following information concerning your request:

At a recent Board meeting where training on the State Ethics Law was being provided, it was determined that a member of the Board of the Commission was considering an action involving the agency that would put him in violation of Section 8-13-730 of the State Ethics Law . . . Specifically, the Board member is the chief of an entity seeking State Recognition as a "Tribe." It is the Board that makes the final decision regarding who will receive State Recognition.

You also indicated you made inquiries regarding this issue to the Governor's Office and the State Ethics Commission, which you state "both agreed that having a member of the Board that has a vested interest in the outcome of a matter coming before that Board does indeed violate Section 8-13-730. However, they were not clear as to whether the Commission is a regulatory agency."

#### Law/Analysis

Section 8-13-730 of the South Carolina Code (Supp. 2005) provides:

Unless otherwise provided by law, no person may serve as a member of a governmental regulatory agency that regulates any business with which that person is associated. An employee of the regulatory agency which regulates a business with which he is associated annually shall file a statement of economic interests notwithstanding the provisions of Section 8-13-1110. No person may be an employee

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of the regulatory agency which regulates a business with which he is associated if this relationship creates a continuing or frequent conflict with the performance of his official responsibilities.

(emphasis added).

The Legislature enacted section 8-13-730 as part of the Ethics, Governmental Accountability, and Campaign Reform Act of 1991 (the "Ethics Reform Act"), which amended the prior version of the Ethics Act. 1991 S.C. Acts 1578. The prior version contained a provision similar to section 8-13-730. Section 8-13-450, which the Legislature repealed with the enactment of the Ethics Reform Act, provided, in relevant part: "Unless otherwise provided by law, no person shall serve as a member of a governmental regulatory agency that regulates any business which that person is associated." S.C. Code Ann. § 8-13-450 (1986).

In 1991, just prior to the enactment of Ethics Reform Act, the South Carolina Supreme Court addressed whether the South Carolina Coastal Council constituted a "governmental regulatory agency" with regard to section 8-13-450, thus prohibiting a person associated with a business affected by the Coastal Council from serving as a member of the Coastal Council. South Carolina Coastal Council v. South Carolina, 306 S.C. 41, 410 S.E.2d 245 (1991). The Court posed the issue as "whether Coastal Council 'regulates any business.'" Id. at 42, 410 S.E.2d at 246.

Examining the regulatory duties of the Coastal Council, the Court discovered the Coastal Council had authority to promulgate rules and regulations including those "which establish a permitting process, general guidelines for all critical areas, and specific projects in the critical areas." Id. The Court acknowledged these rules and regulations "affect innumerable businesses, such as marinas, developers, hotels, seafood processors, and dredging companies. In fact, Coastal Council's regulatory authority affects almost every industry or business that operates in the coastal zone." Id. Finding the term "governmental agency that regulates any business" not defined in the State Ethics Act, the Court first employed the Ethics Commission's test for determining whether an agency regulates a business. Id. at 43, 410 S.E.2d at 247. "[I]f it 'has authority to promulgate rules or regulations or administer legislatively enacted rules and regulations that govern or direct entry into a business, conditions for remaining in that business, and the manner in which the business may be conducted.'" Id. at 43-44, 410 S.E.2d at 247 (quoting Ethics Opinion No. 79-018, October 5, 1978). The Court found:

Coastal Council regulates the preservation and utilization of coastal resources. Coastal Council's regulations are aimed at mitigating environmental loss by assuring that projects are compatible with the environment. Unquestionably, Coastal Council's regulation of the critical areas affects any business which undertakes a project in the

coastal zone. However, Coastal Council regulates the use of critical areas by a business and not the way in which a business is operated. Although Coastal Council may incidentally affect various aspects of a business, it does not specifically regulate any particular business.

Id. at 44, 410 S.E.2d at 247. Furthermore, the Court employed the rules of statutory interpretation finding:

The object of Section 8-13-450 is to prevent a person connected with a specific business from serving as a member of an agency which regulates that business. However, since Coastal Council does not regulate any specific business, but merely regulates the coastal environment, which incidentally affects innumerable businesses, it would be absurd to interpret Section 8-13-450 as prohibiting any person from serving on the Coastal Council who is associated with a business affected by Coastal Council. Such an interpretation would needlessly prohibit many qualified persons from serving on Coastal Council, when in actuality these persons might only occasionally have a conflict of interest with a business affected by the activity of Coastal Council.

Id. at 45, 410 S.E.2d at 247. Accordingly, the Court held the Coastal Council does not regulate a business and therefore, is not within the purview of section 8-13-450.

The Ethics Reform Act, like its predecessor, does not define the term "governmental regulatory agency." Furthermore, our courts have yet to interpret this term with regard to section 8-13-730 of the South Carolina Code. However, we believe a court would apply the analysis presented in South Carolina Coastal Council in determining whether an entity is a governmental regulatory agency for purposes of section 8-13-730. Thus, we examine the regulatory duties of the Commission in light of South Carolina Coastal Council.

Section 1-31-40 of the South Carolina Code (2005) lists the powers and duties of the Commission.

(A) The commission shall:

- (1) provide the minority community consisting of African Americans, Native American Indians, Hispanics/Latinos, Asians, and others with a single point of contact for statistical

and technical assistance in the areas of research and planning for a greater economic future;

(2) work with minority officials on the state, county, and local levels of government in disseminating statistical data and its impact on their constituencies;

(3) provide for publication of a statewide statistical abstract on minority affairs;

(4) provide statistical analyses for members of the General Assembly on the state of minority communities as the State experiences economic growth and changes;

(5) provide the minority community with assistance and information on Voting Rights Act submissions in the State, as well as other related areas of concern to the minority community;

(6) determine, approve, and acknowledge by certification state recognition for Native American Indian entities; however, notwithstanding their state certification, the tribes have no power or authority to take any action which would establish, advance, or promote any form of gambling in this State;

(7) establish advisory committees representative of minority groups, as the commission considers appropriate to advise the commission;

(8) act as liaison with the business community to provide programs and opportunities to fulfill its duties under this chapter;

(9) seek federal and other funding on behalf of the State of South Carolina for the express purpose of implementing various programs and services for African Americans, Native American Indians, Hispanics/Latinos, Asians, and other minority groups;

(10) promulgate regulations as may be necessary to carry out the provisions of this article including, but not limited to, regulations regarding State Recognition of Native American Indian entities in the State of South Carolina; and

(11) perform other duties necessary to implement programs.

(B) The commission may delegate these powers and duties as necessary.

(C) Nothing in this chapter recognizes, creates, extends, or forms the basis of any right or claim of interest in land or real estate in this State for any Native American tribe which is recognized by the State.

S.C. Code Ann. § 1-31-40 (emphasis added). Moreover, section 1-31-50 of the South Carolina Code (2005) states: "The commission may promulgate those regulations necessary to carry out its duties under this chapter."

Based on its duties as cited above, the Commission's primary functions appear to be collecting, analyzing, and disseminating statistical information and assisting minorities by providing information, programs, and services. While the Commission is entitled to promulgate regulations concerning these functions, we are of the opinion these functions and any regulations concerning them would not involve the regulation of a business.

According to your letter, it appears your concern lies in the Commission's ability to offer State certification and recognition of Native American Indian entities. We are unable to conclude that State recognition of a Native American Indian entity is connected with the operation of a business. Furthermore, based on our review of the Commission's authority to promulgate regulations pursuant to sections 1-31-40 and 1-31-50 and the regulations themselves, a copy of which you provided to us, we do not believe these regulations "govern or direct entry into a business, conditions for remaining in that business, [or] the manner in which the business may be conducted." South Carolina Coastal Council, 306 S.C. at 44, 410 S.E.2d at 247 (quoting Ethics Opinion No. 79-018, October 5, 1978). Therefore, in our opinion, the Commission does not constitute a governmental regulatory agency for purposes of section 8-13-750.

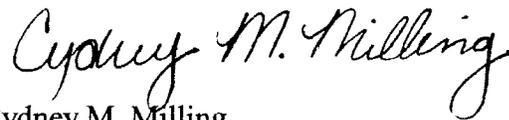
### **Conclusion**

Based the Court's analysis in South Carolina Coastal Council, we do not find the Commission to be a governmental regulatory agency for purposes of section 8-13-730. Thus, as in your example, section 7-13-730 would not prohibit the chief of an entity seeking recognition as a

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Native American Indian entity from serving as a member of the Commission. However, we must note that conflicts of interest may arise due to the chief's service on the Commission while seeking State recognition for his entity. Therefore, other provisions of the Ethics Reform Act may apply to your example. Accordingly, we suggest you seek clarification from the State Ethics Commission to address these possible conflicts of interest.

Very truly yours,



Cydney M. Milling  
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Assistant Deputy Attorney General