

Deep Breaths...

HB317 Doesn't Actually Gut the Ethics Act

By Edward A. Hosp

The outrage sparked by House Bill 317, the self-titled “Alabama Jobs Enhancement Act,” has been somewhat perplexing. For numerous weeks now, several Alabama media outlets, as well as some public officials and a prosecutor appointed as special prosecutor for the case against former Speaker Mike Hubbard, have warned that the bill would “gut” the Ethics Act, and lead to members of the legislature being hired by powerful interests as “economic developers.” Additionally, we have been told that the bill would allow economic developers to spend unlimited amounts of money on public officials in an effort to obtain favorable deals for their employers—

all without disclosure of those expenditures to the public.

The uproar is confusing because the plain language of the bill simply would not allow any of that.¹ In fact, the only thing it seems that the bill would do with respect to the Ethics Act is clarify that economic developers who do not seek action through any legislation do not have to register with the Alabama Ethics Commission. This clarification was deemed essential by the community of economic developers because the projects on which they work are routinely required to be kept confidential during the selection process. Additionally, it is important to understand that this (non-registration, that is) has been the standard practice both before and after the 2010 changes to the Alabama Ethics Act.

A. How Did We Get Here?

For decades, lobbyists in Alabama have been required to register with the Alabama Ethics Commission and disclose the entities that they represented before legislative bodies. Prior to 2011, registration was required *only* for efforts to influence legislation or regulations at the state or local level, though. Specifically, *Alabama Code* Section 36-25-1(20) defined (and still defines) lobbying as:

The practice of promoting, opposing, or in any manner influencing or attempting to influence *the introduction, defeat, or enactment of legislation* before *an* legislative body; opposing or in any manner influencing the executive approval, veto, or amendment of legislation; or the practice of promoting, opposing, or in any manner influencing or attempting to influence the enactment, promulgation, modification, or deletion of regulations before any regulatory body. The term does not include providing public testimony before a legislative body or regulatory body or any committee thereof.

Id. (emphasis added). Typically, those involved in economic development are not involved, at least in the early, confidential stages of a project, in efforts aimed at passing or altering legislation or regulations. As such, until 2011, economic developers did not register as lobbyists with the commission, and no one believed that they needed to.

In 2010, the legislature added a new provision to the *Code*, which provided an additional definition of lobbying. Section 36-25-1.1, which became effective in 2011, now provides that:

Lobbying includes promoting or attempting to influence the awarding of a grant or contract with any department or agency of the executive, legislative, or judicial branch of state government.

No member of the Legislature, for a fee, reward, or other compensation, in addition to that received in his or her official capacity, shall represent any person, firm, corporation, or other business entity before an executive department or agency.

Although this new provision arguably encompasses some of what an economic developer does in the course of his or her early efforts on behalf of a project, generally speaking it was not read to include those individuals. Thus, economic developers continued to operate in Alabama without registering as lobbyists. There is a legitimate debate as to whether that was an appropriate interpretation based on the 2010 change in the law, but it cannot be debated that—in fact—the economic development community did not consider themselves to be lobbyists under the Ethics Act, and therefore did not register.

Then, at the Alabama Ethics Commission’s August 16, 2017 meeting, just over seven months before

HB317 was passed, attorneys from the attorney general’s office spoke to this issue and pointed out to the commission that economic developers could very well be lobbyists under plain language of Alabama’s law and could face criminal charges under that law if they failed to register. Those in the economic development community expressed concerns that, given the confidential nature of most projects, particularly in the early stages, applying a registration and disclosure requirement to those representing companies looking to expand or relocate would result in fewer companies seeking to engage Alabama in discussions regarding potential projects. In response to these arguments, the commission

stated that the issue should be addressed and if necessary clarified by the Alabama Legislature. This “problem,” therefore, has only existed for approximately eight months. House Bill 317 was the administration’s and the legislature’s response to the invitation from the commission to clarify the law.

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B. How Does HB317 Affect the Ethics Act?

The purportedly offensive portion of HB317 is fairly short, covering just one page of the bill. Under that provision:

a person acting as an economic development professional is not a lobbyist, *unless and until he or she seeks incentives through legislative action*, or is

seeking funds over which a legislator or legislative delegation has discretionary control, that are above and beyond, or in addition to, the then current statutory or constitutional authorization.

HB317, Section 3(a) (emphasis added). In other words, an “economic development professional” would not be considered a lobbyist unless he or she seeks to influence legislation or funds over which legislators have some control. In many respects this simply confirms the longstanding definition of a lobbyist as one who seeks to influence legislation, though it does not address the changes made in 2010 related to activities surrounding contracts or grants.

The bill also defines who an economic development professional actually is. According to the bill:

an economic development professional is a person employed to advance specific, good faith economic development or trade promotion projects or related objectives for his or her employer, a professional services entity, or a chamber of commerce or similar nonprofit economic development organization in the State of Alabama.

HB317, Section 3(b). More important, though, the bill also provides who cannot under any circumstances be considered an economic development professional, and would not be exempt from the requirement that they register with the Alabama Ethics Commission. Under the bill:

(c) For the purposes of this section, *the term economic development professional does not include public officials, public employees, legislators, nor any former legislator within two years of the end of the term for which he or she was elected.*

(d) This section shall not apply to any person that is otherwise required to register as a lobbyist.

HB317, Section 3 (emphasis added). Under the bill, therefore, a public official, including a legislator, hired ostensibly as an “economic developer” would not be exempt from registering as a lobbyist. Additionally, a legislator could not be exempt from registration as a lobbyist, even if hired as an “economic developer” for two full years *after* the term for which they were elected. Finally, anyone who is otherwise a lobbyist would also be prohibited from using HB317 to allow them to avoid registering on behalf of an “economic development” client. In other words, if a person currently required to register as a lobbyist is hired by an entity to assist them with an economic development project, that

person would be required to register and report that engagement, because the registration exemption provided by the legislation does not apply to them.

C. Does HB317 Allow Companies to Hire Legislators under the Guise of “Economic Development?”

The short answer to this question is “no.” The slightly longer answer is “no—for multiple reasons set forth in a number of different places in both the bill itself and in existing, unchanged provisions of the Ethics Act.” And here is the even longer answer:

First, as noted above, HB317 specifically provides that public officials, public employees and legislators cannot be considered “economic development professionals” and therefore can never be exempt from the registration requirements of the Alabama Ethics Act. If a company hired a legislator to work as an “economic developer,” HB317 simply would not apply and would have no impact.

Moreover, HB317 simply provides that an economic development professional is not considered a lobbyist. That clarification does not have any effect on other provisions of the Ethics Act, all of which would continue to apply because they apply to more than just lobbyists. For example, as noted above, Section 36-25-1.1 of the Ethics Act specifically provides that “[n]o member of the Legislature, for a fee, reward, or other compensation, in addition to that received in his or her official capacity, shall *represent* any person, firm, corporation, or other business entity before an executive department or agency.” That provision, which uses the very broad term “represent” as opposed to the term “lobbyist,” remains unchanged by HB317.

Further, elected public officials, including legislators, are prohibited elsewhere in the Ethics Act from *representing* (not just “lobbying”) anyone before any branch of state or local government. Section 36-25-23(a) states that:

No public official elected to a term of office shall serve for a fee as a lobbyist *or otherwise represent a client*, including his or her employer, before any legislative body or any branch of state or local government, including the executive and judicial

branches of government, and including the Legislature of Alabama or any board, agency, commission, or department thereof, during the term or remainder of the term for which the official was elected.

Id. (emphasis added). Again, note that Section 23(a), just like Section 1.1, uses the broader term “representation” rather than “lobbying.” Because of the phrasing of these two provisions, merely exempting economic development professionals from registering as lobbyists would not allow an entity to hire an elected official as an economic development professional because that official is still prohibited from “*represent[ing] a client, . . . before any legislative body or any branch of state or local government, including the executive and judicial branches of government, and including the Legislature of Alabama or any board, agency, commission, or department thereof . . .*”

Thus, despite the general prohibition imposed on lobbyists, even a lobbyist is *permitted* to provide food, beverages and travel to a public official as long as it is part of an economic development function (and as long as it is not with the intent to corruptly influence the official’s action).

argue that what lobbyists (and others) are permitted to do today in the way of meals and hospitality is too much—but HB317 doesn’t loosen those rules for an economic development professional.

First, it is important to remember that any expenditure on a public official or public employee designed to corruptly influence their actions is a violation of the Ethics Act whether the person is a lobbyist, an economic developer or a plain old citizen. Section 36-25-7(a) provides that:

No person shall offer or give to a public official or public employee or a member of the household of a public employee or a member of the household of the public official and none of the aforementioned shall solicit or receive anything for the purpose of corruptly influencing official action, regardless of whether or not the thing solicited or received is a thing of value.

Id. (emphasis added). This provision will continue to apply to everyone, whether they are a lobbyist or an economic developer.

It is true that a provision of the Ethics Act specifically prohibits a lobbyist from providing a “thing of value” to a public official. That provision, found in 36-25-5.1, would not apply to economic developers under HB317. However, as a practical matter, this prohibition likely would not apply to economic developers even if they were considered lobbyists because of the current exceptions to the definition of “thing of value.” Specifically, when travel, lodging, meals and hospitality is provided in connection with an “economic development function,” it is already considered outside the definition of a “thing of value.” According to the Ethics Act, an economic development function is defined as “[a]ny function reasonably and directly related to the advancement of a specific, good-faith economic development or trade promotion project or objective.” Thus, despite the

D. Will HB317 Allow Economic Developments To Lavish Public Officials With Gifts, Travel and Meals in an Effort to Influence Their Actions—All without Disclosing Anything?

The ability of an economic development professional to spend money on a public official or public employee, even under HB317, is essentially the same as that of a lobbyist. Reasonable people can certainly

general prohibition imposed on lobbyists, even a lobbyist is *permitted* to provide food, beverages and travel to a public official as long as it is part of an economic development function (and as long as it is not with the intent to corruptly influence the official's action). Nearly every occasion at which an economic development professional would have a reason to purchase a meal for or provide hospitality to a public official would qualify as an economic development function—since in order to be considered an economic developer under HB317 you must be “advanc[ing] specific, good faith economic development or trade promotion projects.” Thus, under HB317, economic developers would be in the same position as lobbyists when making an expenditure in connection with an economic development function.

Finally, nearly identical disclosure requirements apply to a lobbyists and people spending money on a public official while acting as an economic developer. Under the Ethics Act, a lobbyist is required to report any expenditure on a public official, public employee or member of their household if the expenditure exceeds \$250 in a 24-hour period. Again, a reasonable argument can be made that this disclosure requirement is too permissive. However, it is the law and has been the law for decades. As noted above, a nearly identical provision of the law would also apply to individuals who fall under the definition of an economic developer. Section 36-25-19(b) of the Ethics Act provides that:

Any person not otherwise deemed a lobbyist pursuant to this chapter who negotiates or attempts to negotiate a contract, sells or attempts to sell goods or services, *engages or attempts to engage in a financial transaction with a public official or public employee in their official capacity* and who within a calendar day [as opposed to a 24-hour period] expends in excess of two hundred fifty dollars (\$250) on such public employee, public official, and his or her respective household shall file a detailed quarterly report of the expenditure with the commission.

Id. (emphasis added). Economic development professionals seeking to negotiate incentive packages in Alabama clearly would be “engag[ing] or attempt[ing] to engage in a financial transaction with a public official or public employee in their official capacity.” Thus, this reporting requirement would apply to that person if he or she spent funds on a public official. As a result, the reporting requirement that would be imposed upon them is nearly identical to the disclosure requirement that applies to lobbyists.

Conclusion

Given all that has occurred in Alabama politics in the past, it is certainly understandable that there is a level of distrust among the people when there is a proposed change to the Ethics Act, but House Bill 317 simply isn't the bogeyman that many seem to believe it is. To sum up, take a deep breath and understand the following:

- Under HB317, public officials, specifically including legislators, cannot be considered economic development professionals exempt from registration requirements or from the Ethics Act in any other manner.
- Under HB317, elected officials, including legislators, continue to be prohibited from representing anyone, including an employer or a client before any branch or agency of state or local governments, even if their work was categorized as “economic development.”
- Under HB317, any expenditure made on a public official or public employee made by anyone—including a person exempted from the definition of “lobbyist”—to corruptly influence that person's actions continues to be illegal.
- Under HB317, all legal expenditures in excess of \$250 on a public official in a single calendar day must be reported to the Alabama Ethics Commission, a nearly identical requirement to the disclosure requirement imposed on lobbyists. ▲

Endnotes

1. Important disclosures—the author is a registered lobbyist which means that the bill—which exempts lobbyists from being considered “economic development professionals”—does not apply to the author. That said, the author represents several entities with an interest in HB317. The author was not asked by any of those clients to assist in its passage and did not participate on behalf of any clients in the drafting or lobbying of the legislation.
2. In practice, very few people seem to be aware that promoting, opposing or in any manner influencing or attempting to influence the introduction, defeat or enactment of *ordinances* or matters before either city councils or county commissions constitutes lobbying which requires registration with the Alabama Ethics Commission.

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Ted Hosp is the chair of Maynard Cooper's state governmental and regulatory affairs practice group, and is a founder and the immediate past chair of the Alabama State Bar Section on Ethics, Elections & Government Relations Law. He also serves as the chair of the Alabama Access to Justice Commission, and is a member and past chair of the ASB Pro Bono Committee.