

## **CHAPTER 19**

### **ETHICS COMMISSION**

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#### **19.1 Ethics Commission Generally**

The Ethics Commission is comprised of five members who are “fair, equitable citizen[s] of this state and of high moral character and ability.” No public officials, candidates, registered lobbyists (or their principal), or former employees of the Commission are eligible to be appointed as a member. The Commission must have one member who is a former elected public official who has served at least two terms of office. § 36-25-3.

The members of the Commission are appointed by the Governor, the Lieutenant Governor (or in the absence of a Lieutenant Governor, the Presiding Officer of the Senate), and the Speaker of the House of Representatives. Appointments are subject to Senate confirmation, and members assume their duties immediately upon confirmation by the Senate. No members are eligible for reappointment to succeed themselves. If there is a vacancy on the Commission, a successor member shall be appointed by the Governor to serve for the remainder of the unexpired term. The Commission elects one member to serve as Chair of the Commission and one member to serve as vice chair. § 36-25-3.

## **19.2 Ethics Commission Director**

The Ethics Commission appoints a full-time director to manage the daily operations of the Commission. The Director must be confirmed by the Senate, and his or her appointment takes effect immediately upon such confirmation. The Director serves at the pleasure of the Commission and may appoint employees as needed. The Director is responsible for the administrative operations of the Commission. § 36-25-3(f). The Director may appoint part-time stenographic reporters or certified court reporters, as needed, to take and transcribe the testimony in any formal or informal hearing or investigation before the commission or before any person authorized by the commission. § 36-25-3(g).

The Director, with the approval of the Attorney General, may appoint a group of attorneys to work on behalf of the Commission in actions or proceedings brought by or against the Commission. These attorneys shall be commissioned as assistant or deputy attorneys general. § 36-25-3(h). The Director may hire up to eight full-time investigators who will be constituted law enforcement officers of the state “with full and unlimited police power and jurisdiction to enforce the laws of [Alabama] pertaining to the operation and administration of the [Commission and Ethics Act].” The Director may also designate a Chief Investigator. § 36-25-3(i).

## **19.3 Commission Responsibilities for Ethics Act Matters**

The Ethics Commission has historically been responsible for the following:

- Prescribing forms for the statements that are required to be filed in accordance with the Ethics Act. § 36-25-4(a)(1).
- Preparing guidelines setting forth recommended uniform methods of reporting for use by persons who are required to file Statements of Economic Interests. § 36-25-4(a)(2).
- Accepting and filing any written information that is voluntarily supplied that exceeds the requirements of the Ethics Act. § 36-25-4(a)(3).
- Developing, where practicable, a filing, coding, and cross-indexing system consistent with the purposes of the Ethics Act. § 36-25-4(a)(4).

- Making reports and statements filed with the Commission available during regular business hours and online via the internet for public inspection. § 36-25-4(a)(5).
- Preserving all reports and statements for a period consistent with the statute of limitations and disposing of reports and statements when no longer required to be retained. § 36-25-4(a)(6).
- Making investigations with respect to statements filed pursuant to the Ethics Act, alleged failures to file, omissions contained in filings, and other violations of the Ethics Act. § 36-25-4(a)(7).
- Reporting suspected violations of the law to the appropriate law enforcement authorities. § 36-25-4(a)(8).
- Issuing and publishing advisory opinions on the requirements of the Ethics Act, based upon a real or hypothetical set of circumstances. These advisory opinions shall be adopted by a majority vote of the Commission members present and shall be deemed valid until expressly overruled or altered by the Commission or a court of competent jurisdiction. § 36-25-4(a)(9).
- Establishing programs to educate candidates, officials, employees, and citizens of Alabama on matters of ethics in government service. § 36-25-4(a)(10).
- Prescribing, publishing, and enforcing rules to carry out the Ethics Act. § 36-25-4(a)(11).

## **19.4 Commission Responsibilities for Campaign Finance Matters**

The Ethics Commission is also responsible for providing guidance and enforcement regarding provisions of the Alabama Fair Campaign Practices Act (FCPA). § 36-25-4. The Commission must work with the Secretary of State to implement the reporting requirements of the FCPA. The Commission is also responsible for the following:

- Approving all forms required by the FCPA. § 36-25-4(b)(1).
- Suggesting accounting methods for candidates and PACs. § 36-25-4(b)(2).
- Approving a retention policy for all FCPA reports, filings, and underlying documentation. § 36-25-4(b)(3).

- Approving a manual that will be published by the Secretary of State for candidates and political action committees (PACs) that describes the requirements of the FCPA. § 36-25-4(b)(4).
- Investigating and holding hearings regarding alleged violations of the FCPA. § 36-25-4(b)(5).
- Conducting or authorizing audits of FCPA filings when a complaint is filed or when the existence of a material discrepancy or conflict is noticed on any filing. § 36-25-4(b)(6).
- Affirming, setting aside, or reducing civil penalties. § 36-25-4(b)(7).
- Referring all evidence and information to the Attorney General or appropriate district attorney for prosecution of any criminal violation of the FCPA. § 36-25-4(b)(8).
- Conducting investigations and ordering audits in connection with a complaint or other filing alleging a violation of the FCPA. § 36-25-4(b)(9).
- Issuing and publishing advisory opinions on the requirements of the FCPA. § 36-25-4(b)(10).
- Prescribing, publishing, and enforcing rules to carry out the directives of the FCPA. § 36-25-4(b)(11).

The Commission is only involved in these campaign finance areas and certain ethics disclosure activities with respect to elections. It is not involved with other election activities such as voter registration, absentee or overseas voting, vote counts, or election contests.

## 19.5 Civil Penalties for Campaign Finance Filings

Beginning with the 2018 election cycle, a new process for the issuance of civil and criminal penalties became effective. The Secretary of State or judge of probate (depending on where the candidate or PAC is filing its FCPA disclosure forms) has the authority to levy civil penalties for the *untimely filing* of FCPA reports. The Ethics Commission has the authority to levy civil penalties against any person who files a “*materially inaccurate*” FCPA report. § 17-5-19.1(a).

### **19.5.1 Penalties for Reporting Violations**

A person who *unintentionally* fails to timely or accurately submit their report shall be subjected to an administrative fine as follows:

- (a) 1<sup>st</sup> Offense – Lesser of \$300 or 10% of amount not properly reported;
- (b) 2<sup>nd</sup> Offense – Lesser of \$600 or 15% of amount not properly reported;
- (c) 3<sup>rd</sup> Offense – Lesser of \$1,200 or 20% of amount not properly reported; and
- (d) 4<sup>th</sup> Offense in an election cycle shall create a rebuttable presumption of intent to violate the reporting requirements. A 4<sup>th</sup> violation also requires payment of the lesser of \$1,200 or 20% of the amount not properly reported. §§ 17-5-19.1(b) and (c).

A person who *intentionally* violates any reporting requirement of the FCPA shall be guilty, upon conviction, of a Class A misdemeanor. § 17-5-19(b).

### **19.5.2 Review of Civil Penalties**

Any person upon whom a civil penalty is imposed may seek a review by filing a written notice with the Secretary of State or judge of probate within 14 days after the notification was mailed to that person. The Secretary of State or judge of probate shall refer any such request to the Ethics Commission. § 17-5-19.2(a). The Commission “may set aside or reduce a civil penalty upon a showing of good cause.” The person seeking review bears the burden of proof. § 17-5-19.2(b).

## **19.6 Complaints**

The Ethics Commission is responsible for reviewing and investigating complaints of alleged violations of the Ethics Act and FCPA.

### **19.6.1 Content of Complaint**

Prior to commencing any investigation, the Commission must receive a written and signed complaint from a person, “credible and verifiable” information supporting the allegations contained in the complaint that sets

forth in detail the specific charges alleged against an individual and the factual allegations to support those charges. § 36-25-4(d).

### **19.6.2 Anonymous Complaints**

The Commission may not conduct any investigation based upon an anonymous complaint. § 36-25-4(d).

### **19.6.3 Director's Preliminary Inquiry**

The Commission Director must conduct a preliminary inquiry in order to make an initial determination that the complaint alleges facts, which if true, would constitute a violation of the FCPA and that "reasonable cause" exists to conduct an investigation. If the Director determines that the complaint does not allege a violation or that reasonable cause does not exist, the charges shall be dismissed, but the action must be reported to the Commission. § 36-25-4(d).

### **19.6.4 Privacy of Complaints**

Except as necessary to permit the sharing of information and evidence with the Attorney General or district attorney, complaints (and any related evidence) must be kept confidential. § 36-25-4(c). No complaints shall be made available to the public until the final disposition of the matter. Except for notice regarding the disposition of the matter, a complaint may not ever be made public if it is dismissed or found not to have probable cause. § 36-25-4.1.

### **19.6.5 Commission Self-Initiated Complaints**

A complaint may be initiated by a vote of four members of the Commission. Any hearing on such a self-initiated complaint is conducted by a panel of three active or retired judges, who shall be appointed by the Chief Justice of the Alabama Supreme Court, at least one of whom shall be Black. If the panel unanimously finds that the law was violated, they shall forward the case to the attorney general or appropriate district attorney. § 36-25-4(d).

## **19.7 Investigations**

### **19.7.1 Initiation of Investigations**

The Ethics Commission is authorized to conduct an investigation and hold hearings upon the receipt of evidence that alleges a violation of the FCPA or demonstrates a likelihood that the FCPA has been violated. § 36-25-4(b)(5). The Commission is also authorized to conduct investigations into statements filed pursuant to the FCPA with respect to alleged failures to file disclosure reports, omissions contained within disclosure reports, and any statement required pursuant to the FCPA. In addition, the Commission may conduct an investigation upon receiving a complaint by any individual regarding an alleged violation of the FCPA. § 36-25-4(b)(9).

### **19.7.2 Investigation Timing**

After receiving or initiating a complaint, the Commission has 180 days to determine whether probable cause exists. After 180 days, if the Commission does not find probable cause, the complaint shall be deemed dismissed and cannot be reinstated based on the same facts alleged in the complaint. If no action is taken during the 180 days, the matter is dismissed absent a request for a one-time extension: this extension requires a showing of good cause and will consist of 180 additional days. If the Commission finds probable cause for a violation, the case and the Commission's findings shall be forwarded to the attorney general or the appropriate district attorney and referred for appropriate legal action. § 36-25-4(i). The Attorney general or district attorney may notify the Commission in writing about whether it intends to pursue the case. § 36-25-4(j).

### **19.7.3 Audits**

When the Commission determines that an audit of an individual or business should be conducted in order to determine whether the FCPA has been violated, the Commission shall direct the Examiner of Public Accounts to make an audit and file a report with the Commission. § 36-25-4(b)(9).

#### **19.7.4 Subpoena Power**

During an investigation, the Commission may subpoena witnesses and compel their attendance and may also compel the production of supporting evidence. If any person fails to comply with any subpoena that is lawfully issued, or if any witness refuses to produce evidence or to testify during an investigation, the court or judge may compel that individual's compliance upon penalty for contempt. A subpoena may only be issued upon the vote of four members of the Commission and upon the express written request of the Commission Director. Any person who is served with a subpoena has the right to object to its issuance within 10 days. § 36-25-4(h).

### **19.8 Statement of Economic Interests**

A Statement of Economic Interests must be filed by all candidates, all public officials at the state, county, or municipal levels of government or their instrumentalities, and other public officials and employees. The requirements for filing the Statement of Economic Interests form by candidates were changed by Act 2019-529 so that the Statement must now be filed with the Ethics Commission within five days of filing of the candidate's qualifying papers with the appropriate election official. § 36-25-15(a). Within five days of receiving a declaration of candidacy or a petition from a candidate, each election official shall notify the Commission of the name of the candidate and the date on which the person became a candidate. The Commission must confirm to the appropriate election official within five business days that the candidate has filed the form as required. § 36-25-15(b). Failure to comply with this requirement shall cause the candidate to be deemed not qualified, and his or her name shall not appear on the ballot. § 36-25-15(c). Statements of Economic Interests are available for viewing on the Commission's website.



## 19.9 Recent Commission Opinions on Elections and Campaigns

Date / Opinion No. / Requestor	Topics	Ethics Commission's Synopsis of Advisory Opinion on FCPA Matters
2-3-2016 AO 2016-01 Bill Espy, Melton, Espy & Williams, P.C.	Federal Campaign Participation by State Officials	<p>Federal Preemption Of State Ethics And Campaign Laws In Federal Elections</p> <p>While state elected officials may campaign on behalf of a candidate for federal office, they may not use their office or the influence thereof to benefit themselves, a member of their family, a business with which they are associated or a principal campaign committee in contravention of the Alabama Ethics Law.</p> <p>When state elected officials are campaigning on behalf of a candidate for federal office, they must remain mindful of the restrictions placed on them by the Alabama Ethics Law, as the use of office for personal gain provisions do not impact on federal elections and are not superseded by federal election laws.</p> <p>While federal election laws generally preempt state law, except in the areas that are "Interest of the State," the conduct of public officials and public employees as they campaign for federal candidates, as well as their conduct in all aspects of their public position, is an area that falls within the "Interest of the State."</p>
2-3-2016 AO 2016-02 Ed Packard, Office of Secretary of State	Statement of Economic Interests	<p>Statement Of Economic Interests Filings By Candidates/Form To Be Filed Simultaneously With The Date The Candidate Qualifies For Office</p> <p>The Ethics Law requires that all candidates file with the Alabama Ethics Commission a completed Statement of Economic Interests form simultaneously with the date that candidate qualifies for office.</p> <p>A filing that is properly addressed, postage prepaid, postmarked, and mailed on the date</p>

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		<p>the candidate qualifies complies with the statute.</p> <p>A candidate may file a Statement of Economic Interests form online.</p> <p>For the purpose of satisfying the requirements of § 36-25-15(a) and (b), the "election official" is the individual or office accepting a candidate's qualifying papers, Declaration of Candidacy, or petition for ballot access.</p>
<p>6-1-2016 AO 2016-17 Ed Packard, Office of Secretary of State</p>	<p>Statement of Economic Interests</p>	<p>Statement Of Economic Interest Filings By Independent Candidates/Form To Be Filed Simultaneously With The Time An Individual Becomes A Candidate</p> <p>An independent candidate who has filed a petition for ballot access with the election official is required to simultaneously, on the date of that filing, file a Statement of Economic Interests form with the Alabama Ethics Commission.</p>
<p>2-1-2017 AO 2016-23 Tom Albritton, Executive Director Alabama Ethics Commission (Self- generated)</p>	<p>Campaign Funds for Personal Use</p>	<p>Use Of Campaign Funds For Personal Use</p> <p>The use of campaign funds for personal use is prohibited under both the Ethics Act and the Fair Campaign Practices Act (FCPA). The Commission uses the "but for" test to determine whether expenses may be paid for with campaign funds pursuant to these Code sections. Personal use is any use of funds in a campaign account to fulfill a commitment, obligation, or expense of any person that exists for reasons irrespective of the person's status as a candidate or officeholder. Stated in terms of the applicable test, the expense may be paid for with campaign funds if it would not exist "but for" the person's status as a candidate or officeholder.</p> <p>The payment from surplus campaign funds of travel expenses associated with automobile usage is allowed when incurred for campaign</p>

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		<p>purposes and where reasonably related to performing the duties of the office held, but only insofar as the campaign maintains records justifying such use.</p> <p>Public officials may receive reimbursement for mileage incurred pursuant to the duties of the office held either from the State of Alabama as allowed to state employees generally, or from their campaign at either the state rate or the IRS-approved standard rate, but not from both sources, and as long as the official maintains the same record keeping as noted herein.</p>
10-5-2016 AO 2016-28  Tom Whatley, Alabama State Senate	Fundraising for Others	<p>Campaign Activities/Member Of The Senate Raising Funds And Otherwise Campaigning For Candidates To Elective Office</p> <p>A member of the Alabama Senate may raise funds and otherwise campaign for another candidate for state office, and may solicit lobbyists, subordinates of lobbyists, and principals to make campaign contributions for that candidate but only within the restrictions of the Fair Campaign Practices Act and the Ethics Act.</p>
10-5-2016 AO 2016-30 Steve Shaw, Redden, Mills, Clark & Shaw, LLP	Use of Campaign Funds for Legal Fees	<p>Use Of Excess Campaign Funds/Public Official Using Campaign Funds To Pay Attorney To Request Advisory Opinion</p> <p>A candidate may use campaign funds to pay for legal advice sought for compliance with the FCPA, as well as expenses incurred when requesting an Advisory Opinion from the Commission, as a "necessary and ordinary expenditure of the campaign." For officeholders, in order to be reimbursable as "reasonably related to performing the duties of the office held" under § 17-5- 7(2) the fees and costs can only be incurred as a result of advice sought to stay in compliance with the Ethics Act and the FCPA (which would</p>

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		<p>include seeking Advisory Opinions from the Commission) or other state or federal laws specifically related to the performance of the officeholder's official duties.</p> <p>Under § 17-5-7(7), unless the allegations against the officeholder are that he or she committed the act while acting in his or her official capacity, the fees related to those allegations or the investigation of them are not "reasonably related to performing the duties of the office held."</p>
<p>12-7-2016 AO 2016-35  Marc Ayers, Counsel to the Alabama Senate Republican Conference Bradley</p>	<p>Caucus Fundraising</p>	<p>Legislative Caucuses Organized Under Section 17-5-5.1 And Fundraising Activities</p> <p>A legislative caucus organized under § 17-5-5.1 and duly registered with the Secretary of the Senate and/or Clerk of the House of Representatives can solicit and receive donations even from principals, but only for their "administration and operation" and as long as in doing so they do not convert the donations to personal use of the members.</p> <p>Members of a legislative caucus, as public officials, may not solicit contributions from a lobbyist for caucus administrative and operational purposes, as a lobbyist may not be solicited for anything other than a campaign contribution, and a donation to these legislative caucuses is not a campaign contribution.</p> <p>Staff hired by the caucuses may not solicit in violation of restrictions expressed herein or otherwise make a prohibited solicitation. Members of the caucus may attend, speak, and express appreciation as long as in doing so they not separately violate any of the restrictions expressed herein.</p>

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4-26-2017 AO 2017-02 Afrika Parchman, General Counsel Birmingham City Schools	Use of Excess Campaign Funds	<p>Use Of Excess Campaign Funds/Elected Official Contributing Excess Campaign Funds To 501(c)(3) Organization</p> <p>A public official may donate excess campaign monies to an organization to which a federal income tax deduction is permitted under the IRS Code of 1986 or any other charitable, educational or eleemosynary cause of Section 501of Title 26 of the U.S. Code.</p> <p>Campaign funds may not be converted to personal use.</p> <p>A public official cannot donate excess campaign funds in a manner that would provide a personal gain to themselves, a member of their family or a business with which they are associated.</p> <p>An elected member of the Birmingham Board of Education may donate the remaining funds in his campaign account to the Black Leaf Foundation, a 501(c)(3) nonprofit organization, where he is not a Board member or otherwise compensated by the nonprofit, and none of his family members are employed by, or otherwise compensated by the nonprofit.</p>
4-26-2017 AO 2017-04 Laura Petro, Circuit Judge, Tenth Judicial Circuit	Use of Excess Campaign Funds	<p>Use of Excess Campaign Funds/An elected official may donate excess campaign funds to a 501(c)(3) charitable organization on whose Board of Directors they serve, when the position is non-compensated and neither the public official, nor their family members, nor any other business with which they are associated receives any personal gain from either the donation or the 501(c)(3).</p>

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<p>4-26-2017 AO 2017-05 Tom Whatley, Alabama State Senate</p>	<p>Candidate Self-Loan Restrictions</p>	<p>Fair Campaign Practices Act (FCPA)/The Fair Campaign Practices Act defines the terms "candidate," "public official," and "principal campaign committee" separately. They, therefore, each carry a particular definition and application and are not to be used interchangeably.</p> <p>An individual, who has taken the action under the FCPA to become a candidate, may make a loan to their principal campaign committee outside the one-year/120-day window; however, this exception applies only to candidates and does not otherwise apply to public officials, unless they can factually establish that they are "candidates" per Ala. Code § 17-5-2.</p> <p>An individual holding one office, who is termed-out from seeking re-election to that office, or who seeks election to another office, may not loan money to their existing principal campaign committee, but must establish a new and separate principal campaign committee for the new office sought.</p>
<p>6-7-2017 AO 2017-08 Deborah Long Executive Vice President, Chief Legal Officer and Secretary Protective Life Corporation</p>	<p>Businesses &amp; Political Activities</p>	<p>* * *</p> <p>...Activities qualifying as exceptions to the definition of "Contribution" under the Fair Campaign Practices Act/Hosting and inviting people to campaign events and making introductions</p> <p>Within the context of a political campaign, a Company employee may host and invite people to attend a campaign event or meeting or introduce a public official to business leaders if that employee is volunteering their time or otherwise providing items or things other than "time" as specifically recognized in § 17-5-2(a)(3)(b)(1-6). This support by individuals would not be prohibited "things of</p>

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		value" under the Ethics Act.
6-6-2018 AO 2018-03 Sonny Brasfield, Association of County Commissions of AL	Municipal Hiring of County Employees for Election Duties	Counties and municipalities may enter into contracts through which the municipality reimburses the county for use of the County's election equipment and county employees who possess the requisite skill and knowledge to operate the equipment. However, municipalities may not directly engage the county employee to do so under these facts without putting the employee in the position of violating § 36-25-5(a) and (c).
6-6-2018 AO 2018-04 Dr. Jennifer Gray	Use of Excess Campaign Funds	Friends of Jennifer Gray, the requestor's principal campaign committee, may use campaign funds to pay for the childcare expenses described in the request to the extent such expenses are incurred as a direct result of campaign activity and are tied to specific campaign events. Under the facts supplied, the candidate would not have needed the childcare but for the fact that she is a candidate and without childcare she cannot participate in the described activities. Moreover, she has no reasonable option available to her but to pay for childcare. The payments must be reasonable and customary for the services rendered, and the campaign must properly document the expenditures. <i>The conclusion reached herein applies only to these facts and may not be applied beyond these facts.</i>

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10-3-2018 AO 2018-11 Ryan Robichaux, Bradley Arant Boulton Cummings on behalf of AL Consumer Finance Association Political Action Committee	Reduction of FCPA Offenses	The number of the offense is included in the term “civil penalty” and may be reduced, along with any monetary fine, at the discretion of the Commission upon a showing of good cause pursuant to § 17-5-19.2. <i>See also AG AO 2019-021 to Secretary of State John Merrill.</i>
10-7-2020 AO2020-05 Christopher J. England, Chairman, Alabama Democratic Party	PAC-to-PAC Transfers	A federally-registered PAC that complies with all FEC regulations and Federal laws may not contribute funds to the Alabama Democratic Party, an Alabama PAC. Money donated for use in federal campaigning activity is not subject to the PAC-to-PAC ban because federal law pre-empts state law with respect to federal campaign activity