INFORMAL ADVISORY OPINION NO. 96-5

The Hawaii State Ethics Commission ("Commission") issued a charge against a state official alleging violations of the State Ethics Code, Chapter 84 of the Hawaii Revised Statutes ("HRS"), in connection with his participation in two golf tournaments.

With respect to each of the golf tournaments, the official, who was a member of a state board, was charged with violating HRS section 84-11, known as the gifts law. That provision of the State Ethics Code states as follows:

> **§84-11 Gifts.** No legislator or employee shall solicit, accept, or receive, directly or indirectly, any gift, whether in the form of money, service, loan, travel, entertainment, hospitality, thing, or promise, or in any other form, under circumstances in which it can reasonably be inferred that the gift is intended to influence the legislator or employee in the performance of the legislator's or employee's official duties or is intended as a reward for any official action on the legislator's or employee's part.

"Official action" is defined by HRS section 84-3 as "a decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority." HRS section 84-11 prohibits a gift to a state official or employee if one can "reasonably infer" that the gift is intended to reward or influence discretionary action on the part of the state official or employee.

In his answer to the charge, the official admitted he had violated the State Ethics Code as alleged in the charge. The facts and circumstances relevant to the official's involvement in the golf tournaments and the Commission's disposition of the case are set forth in the following paragraphs.

The Commission was informed that a certain golf tournament for professional and amateur golfers was an annual event held on a neighbor island. The charge issued against the official pertained to his participation in that tournament in two different years. The official said that his participation in the tournaments, referred to hereinafter as "Golf Tournament 1" and "Golf Tournament 2," resulted from printed, unsigned invitations.

<u>Golf Tournament 1</u>

The official was invited to participate in Golf Tournament 1 by a certain company, hereinafter referred to as "Company A," which was the title sponsor of the event. According to Company A, the company paid a sponsorship fee to the producers of the tournament in order to sponsor the event. The official participated in the event for two days. Company A said that it had been either the title sponsor or an associate sponsor of the tournament for several years. The sponsorship fee, the amount of which varied from one year to the next, entitled Company A and its guests to various privileges, including several slots in the professional-amateur ("pro-am") tournament. The company said that one year, it paid a sponsorship fee of $110,000, which included 16 slots. In the second year after Golf Tournament 1 occurred, the Commission received information from another source regarding the value of an individual pro-am slot to participate in the event. According to that source, the value of an individual slot had been approximately $4,000 for the prior two years. Hotel accommodations for Company A's invited guests were included in the package provided by the producers of the tournament in return for the sponsorship fee paid by Company A. The official said that he accepted hotel accommodations that apparently were included in the package. According to Company A, guests were generally picked up by Company A staff at the airport and driven to the hotel, although guests could have rented cars at their own expense. Airfare was not included. The official said that he paid his own airfare. According to Company A, most meals were provided by the tournament and were also covered by the sponsorship fee. The official stated that he paid for his own meals. According to Company A, tee-gift packages, the cost of which was covered by the sponsorship fee, were provided to all pro-am tournament participants. The official said that he received a set of four golf clubs (woods) and several smaller gifts, including a canvas carry-on bag and assorted candies and nuts. It did not appear that the golf clubs came directly from Company A. The official informed the Commission that he gave the clubs away to friends and retired people who were not associated with state government.

The official said that he participated in Golf Tournament 1 in his state capacity. He stated that he was invited as a representative of state government. That was supported by Company A. According to Company A, it was Company A's practice to invite a cross-section of community leaders to attend the tournament, and the company felt it would be a breach of protocol not to invite representatives of state government. It was Company A's understanding that the official's participation signified the State's support of the event being held in Hawaii, and afforded him and other representatives of the State the opportunity to promote tourism or other business opportunities for the State.

It appeared that the official took official action affecting Company A. He informed the Commission that Company A was regulated by his state board. He explained that his board reviewed Company A's filings regarding certain costs and proposed capital improvement projects. The official provided the Commission with a listing of all matters that had been submitted to his board for action by Company A for five years from the effective date of his appointment to the board, and the actions that had been taken by his board on those matters. Those matters included but were not limited to numerous filings regarding certain costs, requests for approval of proposed capital improvement projects, and investigations initiated by the official's board. The official explained that filings regarding certain costs and capital improvement expenditure proposals were normally handled at the board staff level and were routinely allowed by his board to take effect, unless an objection was filed by an interested party, or his board on its own motion decided to investigate such a filing or proposal. The official further explained that such a filing automatically took effect unless it was suspended by his board, and that a capital improvement project for which expenditures were proposed automatically became part of a regulated company's ability to generate income, unless it was rejected by his board. The board's rejection of all or part of such a project also influenced the company's ability to generate income. In any event, the official's board exercised significant regulatory control over Company A.

<u>Golf Tournament 2</u>

The official said that he participated in Golf Tournament 2 the year after Golf Tournament 1 occurred, upon the invitation of a certain company, referred to hereinafter as "Company B." According to the official, Company B was the title sponsor of the event. The official participated in Golf Tournament 2 for two days.

According to a representative of Company B, the fee for a pro-am slot in the tournament was approximately $4,000. The official stayed at a hotel. He said he did not know who paid his tournament fees, the cost for him to participate in the tournament, or the cost of his hotel accommodations. He said that he paid for his own airfare and meals. The Commission was informed that participants received, as part of their entry fee, a gift package that included a set of golf clubs, golfing apparel, and golf balls, estimated at a retail value of $2,000. The official stated that he received a set of four golf clubs (woods) and several smaller gifts, including a canvas carry-on bag and assorted candies and nuts. The official said that he gave the clubs away to friends and retired people who were not associated with state government.

The official said that he participated in Golf Tournament 2 in his state capacity. It was his understanding that the tournament sponsor, in exchange for sponsorship, had certain slots that it could fill in the pro-am tournament, and chose to fill those slots with business and government participants. The official said he presumed that he was filling one of the "government" slots. That was supported by Company B. According to Company B, the company invited local government and business leaders to its events both as a matter of protocol and to enhance community participation. Company B stated that the official was invited as a government official for those reasons and because he was a golfer who the company felt would be interested in the tournament. Company B also expressed the view that such an event allowed state officials to "network" with mainland visitors and thus promote the State.

The official informed the Commission that a certain company, hereinafter referred to as "Company C," that was a subsidiary of Company B, was regulated by his board. The official described specific instances in which Company C had matters before his board. He said that previously, his board had approved an application from Company C to transfer certain property of another company, hereinafter referred to as "Company D" (which he said was then the parent company of Company C), to another company, hereinafter referred to as "Company E," and an affiliate of Company E. The official explained that the application was filed pursuant to an agreement that provided for the unification of a Company E affiliate with and into Company D, with Company D being the surviving corporation owned by one or more Company E affiliates. The official also said that the year Golf Tournament 2 was held, Company C filed a notice regarding its financial structure with his board. The official explained that his board's rules provided for the filing of such a notice to enable his board to anticipate and schedule its workload. He said that such a notice was required to be filed prior to the filing of an application for an approval that would enhance the financial viability of the company. He noted that in the case of Company C, the request became moot, because Company C never filed its application for approval. The official reported that Company C had not made any filings or applications for approvals that would enhance the company's financial viability with his board since the beginning of his tenure on his board. Company B stated that it usually had applications or matters before state agencies, including the official's board, at any given time, but it was not believed that any matters were pending before the official's board during the time of Golf Tournament 2.

For each of the subject golf tournaments, the official was charged with violating the gifts law, HRS section 84-11, for accepting a gift of an invitation to participate in the event, and for accepting a gift of golf clubs given in connection with his participation in the event, under circumstances in which it was reasonable to infer that the gifts were intended to influence him in the performance of his official duties or as a reward for official action on his part.

The official responded to the charge by admitting that he had violated the State Ethics Code as alleged in the charge. He stated that "on hindsight" he conceded and agreed with the Commission that the "mere fact" that his board regulated Company A and Company C (a Company B subsidiary) "could have or may have raised the inference" that the gifts were intended to influence or reward him in his official capacity. In a supplemental response to the charge, the official stated:

> I am conceding and agreeing with the State Ethics Commission's findings that both [Company B's] and [Company A's] gifts of playing in the [annual golf tournament] were accepted by me under circumstances in which it was reasonable to infer that

> the gifts were intended to influence me in the performance of my official duties or as a reward for official action on my part.

The Commission believed that the official's participation in Golf Tournaments 1 and 2 was in violation of the gifts section of the State Ethics Code. At the same time, the Commission recognized that it appeared to have been customary for companies in the private sector to invite members of government and the business community to participate in events such as golf tournaments. The official stated that at the time of his participation in the events, he "did not consider what inferences might be raised" from his participation. He said that his reasons for accepting Company A's and Company B's invitations were: (1) to increase the community's (particularly the business community's) awareness of his board and the potential impact of his board's decisions on the State's economy; and (2) to get to know the officers and management personnel of Company A's parent company headquartered on the mainland.

The Commission observed that although those might have been noble reasons for participating in the golf tournaments, those reasons were insufficient to overcome the restrictions in, and rationale for, the gifts law, HRS section 84-11. The Commission stated that the test in the gifts law was whether it was "reasonable to infer" that a gift was given with an intent to influence or reward. In the official's case, the Commission believed that such an inference could easily and reasonably have been drawn. The dollar value of a slot to play in the tournaments in question appeared to have been substantial--as high as $4,000. The official accepted those gifts from Company A, which was regulated by his board; and from Company B, which had a subsidiary company that was regulated by his board. As a member of his board, the official exercised his discretionary authority on matters pertaining to those companies that came before his board. The State Ethics Commission therefore believed it could be "reasonably inferred" that the invitations extended to the official to participate in Golf Tournaments 1 and 2 by Company A and Company B respectively, were intended to influence him in the performance of his official duties or intended as a reward for official action on his part. Therefore, the official was prohibited from accepting the invitations.

In short, the donors provided gifts of substantial value to a state official with significant regulatory duties over the donors. Indeed, on hindsight, the official conceded that a reasonable inference could be made that the gifts were intended to influence or reward him in his official capacity, due to the fact that Company A and Company C were regulated by his board. The State Ethics Commission acknowledged and appreciated the official's willingness and candor in recognizing and accepting the restrictions set forth in HRS section 84-11, and understood his reasons for wishing to participate in the golf tournaments. Based on those considerations and the past custom of state officials participating in golf tournaments, the Commission elected not to pursue the charge against the official any further. The Commission instead issued this informal advisory opinion in accordance with HRS section 84-31(b), which authorizes the Commission to render an informal advisory opinion in lieu of pursuing further charge proceedings.

The Commission, however, reminded the official that as a state official, he was held to the highest standards of ethical conduct. As mandated by Article XIV of the Hawaii State Constitution, the State Ethics Code was established on the premise that "[t]he people of Hawaii believe that public officers and employees must exhibit the highest standards of ethical conduct . . . ." In interpreting the State Ethics Code, the Commission was guided by HRS section 84-1, which states that the State Ethics Code "shall be <u>liberally construed</u> to promote high standards of ethical conduct in state government." [Emphasis added.] The Commission stated that the gifts law, HRS section 84-11, is based on the <u>appearance</u> of impropriety, not the actuality of such. The Commission believed that confidence in government was furthered through the law's prohibition of the appearance of impropriety in relation to the acceptance of gifts.

In the official's response to the charge, he stated that he had no intention of being influenced in the performance of his official duties or rewarded for any official action on his part. The Commission informed him, however, that the gifts law focused on the appearance of a gift's influence on the recipient, rather than on the actual intent of the donor to influence or reward the recipient, or of the actual effect the gift might have on the recipient. In determining whether it was "reasonable to infer" that a gift was given to influence or reward a state official or employee, the Commission stated that it considered all relevant factors, such as the value of the gift and the nature of the discretionary action the state official or employee had taken or might take with respect to the donor of the gift. The Commission noted that a state official or employee's contention that a gift would not actually influence him or her was not a factor in determining the legality of accepting a gift under HRS section 84-11. The Commission appreciated the official's refusal to be influenced by gifts, and noted that consciously allowing gifts to influence one in one's duties would, of course, be violative of the State Ethics Code.

The Commission noted that while the official might have been invited to participate in the golf tournaments as a representative of state government, that would not have been sufficient to overcome the concerns raised under HRS section 84-11 in his case. First, the value of the gifts was substantial. Second, the donors were subject to significant official action on his part, which consisted of significant regulatory control over the donors.

Because the official's acceptance of the invitations was forbidden in the first place, his acceptance of the golf clubs, of course, should not have become an issue. But he in fact participated in the golf tournaments and participated in those events in his state capacity, which led him to become a recipient of the golf clubs. The Commission believed that the official's acceptance of the golf clubs was in violation of the State Ethics Code. In particular, the Commission believed that HRS sections 84-13 and 84-13(2) prohibited him from accepting those items. HRS sections 84-13 and 84-13(2) state as follows:

> **§84-13 Fair treatment.** No legislator or employee shall use or attempt to use the legislator's or employee's official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for oneself or others; including but not limited to the following:
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> . . .
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> (2) Accepting, receiving, or soliciting compensation or other consideration for the performance of the legislator's or employee's official duties or responsibilities except as provided by law.

The Commission explained that HRS section 84-13 prohibits state officials and employees from using their state positions to obtain unwarranted benefits for themselves or others. The Commission noted that, in particular, HRS section 84-13(2) prohibits state officials and employees from accepting or soliciting any "compensation" or other "consideration" for the performance of official duties unless the compensation or consideration is provided for by law. The Commission stated that the term "compensation" is defined in section 84-3 of the State Ethics Code as "any money, thing of value, or economic benefit conferred on or received by any person in return for services rendered or to be rendered by oneself or another." It was explained that because the term "compensation" includes any thing of value or of economic benefit, "compensation" also includes any gift that might be given to a state official or employee "for the performance of" that individual's official duties or responsibilities. The Commission explained that it interprets HRS section 84-13(2) as prohibiting state officials and employees from unjustly enriching themselves by soliciting or accepting anything of value simply <u>because</u> of the performance of their official duties.

The Commission believed that the golf clubs given to the official in connection with his participation would be deemed "compensation" given "for the performance of" his official duties or responsibilities. He thus was prohibited from accepting the golf items under HRS section 84-13(2). At most, the clubs would be construed as gifts to the State as opposed to personal gifts to the official, since he participated in the golf tournaments in his state capacity. Therefore, the official was prohibited by HRS section 84-13 from accepting the items to personally benefit himself or others. The official was thus barred from giving the items away to his friends or others. Since the items had already been disposed of, however, and it appeared that the official had come to realize that he should not have accepted the invitations to participate in the tournaments in the first place, the Commission elected not to pursue the issue any further. The Commission advised the official for the future, however, that the State Ethics Code prohibited him from using his official position to secure or grant unwarranted benefits for himself or others.

Finally, the Commission noted that it appeared that the golf clubs might not have come directly from the companies who extended the invitations to the official. The donors of those items, however, were not identified. The Commission stated that the official might have been prohibited under HRS section 84-11, the gifts law, from accepting the golf clubs if the donors of clubs were subject to his official action. In any event, he was prohibited by HRS sections 84-13(2) and 84-13 from accepting the items, for the reasons previously discussed.

The Commission stated that it recognized that at times, a state official or employee might be invited to participate in a golf tournament such as the events in question as a representative of the State of Hawaii. The Commission noted that questions might arise, however, if the invitee took official action with respect to the donor of the invitation. The Commission stated that therefore, it would behoove the invitee to seek advice from the State Ethics Commission <u>prior</u> to accepting the gift, so that the nature of the official action and other relevant factors could be reviewed and a determination could be made as to whether acceptance would be permissible. Under the particular facts and circumstances of the official's situation, the State Ethics Code prohibited him from accepting the gifts.

The Commission appreciated the cooperation the official had shown throughout its investigation and review of the matter.

Dated: Honolulu, Hawaii, June 28, 1996.

STATE ETHICS COMMISSION
Cassandra J.L. Abdul, Chairperson
Bernard E. LaPorte, Vice Chairperson
Arlene Kim Ellis, Commissioner
Carl T. Sakata, Commissioner

Note: There was a vacancy on the Commission when the opinion was signed.