March 14, 2007

Pat Hudson, Chairman
State Workforce Investment Board
1201 Main Street, Suite 1600
Columbia, South Carolina 29201

Dear Mr. Hudson:

We understand from your letter that you desire a legal opinion of this Office on behalf of the South Carolina State Workforce Investment Board (the "Board"). You inquire as to the ability of the Board's members to attend meetings via telephone. Specifically, you ask:

> 1) whether or not the attendance of a board member may be via telephone;
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> 2) whether or not a member present via telephone can be counted as part of a quorum; and
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> 3) whether or not the vote of a member attending via telephone is valid.

Law/Analysis

The Board was created pursuant to the Workforce Investment Act (the "Act") enacted by the United State Congress in 1998. Workforce Investment Act of 1998, Pub. L. No. 105-220, 112 Stat. 836 (1998). Section 2811 of title 29 of the United States Code states the purpose of the act as follows:

> The purpose of this subchapter [29 U.S.C.A. § 2811 et seq.] is to provide workforce investment activities, through statewide and local workforce investment systems, that increase the employment, retention, and earnings of participants, and increase occupational skill attainment by participants, and, as a result, improve the quality of the workforce, reduce welfare dependency, and enhance the productivity and competitiveness of the Nation.

Furthermore, in a 2003 opinion, citing to a Delaware Attorney General's opinion, we described the Act as follows: "'[t]he Workforce Investment Act . . . is a federal appropriations bill that envisions a relationship between the U.S. Department of Labor and the Governors of participating states.'" Op. S.C. Atty. Gen., March 19, 2003 (quoting Op. Del. Atty. Gen., April 26, 2001).

Section 2821 of title 29 to the United States Code establishes state workforce investment boards. This provision states: "The Governor of a State shall establish a State workforce investment board to assist in the development of the State plan described in section 2822 of this title and to carry out the other functions described in subsection (d) of this section." 29 U.S.C.A. § 2821(a). Section 2821 does not discuss whether members of state boards may conduct meetings via telephone.

In the past this Office commented on the conduct of meetings by various public boards via telephone. In an opinion dated January 21, 1992 we discussed whether the Joint Appropriations Review Committee ("JARC") may poll its members via telephone as a means of taking action on certain decisions. Op. S.C. Atty. Gen., January 21, 1992. This question lead to a discussion of what constitutes a "meeting." Citing to American Jurisprudence, we stated:

> Generally, it is recognized that
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> > [a] municipal or county council or a legislative body can act only as a body and when in legal session as such. And the powers of a municipal council or body must be exercised at a meeting which is legally called. Action of all the members of the council [or body] separately is not the action of the council [or body], and an agreement entered into separately by the members of the council [or body] outside a regular meeting is not binding.
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> Moreover, it has been stated that
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> > [t]he powers and duties of boards and commissions may not be exercised by the individual members separately. Their acts and specifically acts involving discretion and judgment, particularly acts in a judicial and quasi-judicial capacity, are official only when done by the members formally convened in session, upon a concurrence of at least a majority, and with the presence of a quorum of the number designated by statute.

Id. (quoting 56 Am.Jur.2d Municipal Corporations § 155; 2 Am.Jur.2d Administrative Law § 288). Although we ultimately determined telephone polling does not constitute a meeting, we deduced that a telephone conference call would constitute meeting. Looking to provisions of the South Carolina Freedom of Information Act ("FOIA"), we concluded:

> A telephone conference call would appear to be one means of handling a matter in an emergency situation such as your letter describes. A meeting is defined by § 30-4-20(d) to be "the convening of a quorum of the constituent membership of a public body, whether corporal or by means of electronic equipment, to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power." (Emphasis added.) This Office has advised previously that such language authorizes a meeting to be convened by means of a telephone conference call, Ops. Atty. Gen. dated March 25, 1981 and November 17, 1980, apparently at least in the absence of a statute requiring a public body to meet physically in a certain place . . . Thus, if JARC were to convene via a telephone conference call set up as described in these two opinions, with public notice requirements of § 30-4-80(b) observed, so that it may act collectively rather than its members acting individually and independently of each other, such would appear to comply with the requirements of the Freedom of Information Act.

Id. .

Subsequently, in 2005, we reviewed a city ordinance setting forth procedures for telephonic meetings to be conducted by a city council. Op. S.C. Atty. Gen., August 25, 2005. The ordinance calls for all members attending by teleconference to be able to hear all comments made at the meeting and in turn all councilmembers, staff, and members of the public physically present at the meeting to be able to hear the teleconferencing councilmember. Id. We examined the ordinance in light of section 30-4-20(d) defining the term "meeting" under FOIA, emphasizing its inclusion of those "by means of electronic equipment." Id. Citing to a November 17, 1980 opinion, we concluded that so long as the city council complies with all of the other requirements under FOIA, such as the notice and minute keeping requirements, the procedures set forth in the ordinance for telephonic meetings would comply with the Freedom of Information Act. Id.

In reviewing the enabling legislation establishing the Board, we find no requirement that its meetings must physically be held in a particular place. Thus, under South Carolina law, presuming all other FOIA requirements are satisfied, we believe the Board may hold its meetings via telephone conference call. However, because the Board was established, presumably via executive order from the Governor and in accordance with federal law, we must consider whether the answer to your query lies in State law or whether we must look to federal law to determine the validity to telephonic meetings of the Board.

In our research, we were unable to find any court decisions discussing the status of state workforce investment boards. However, we found a Delaware Attorney General's opinion considering whether that state's Workforce Investment Board is a state agency and whether it has sovereign immunity. Op. Del. Atty. Gen., April 26, 2001. The Attorney Delaware General

concluded because the Workforce Investment Board acts on behalf of the state and its members serve the Delaware public, it is a state agency for purposes of the Delaware Tort Claims and is protected by sovereign immunity. Id. Thus, this opinion indicates provisions of state law may apply to state workforce investment boards.

Nonetheless, two Connecticut Attorney General's opinions indicate workforce investment boards are controlled by federal law. In one opinion, the Connecticut Attorney General concluded "the State has no authority to consolidate local workforce investment areas or change the current service areas or methods of operation" unless certain findings provided in the Workforce Investment Act were made by the Governor because the provisions of the Workforce Investment Act constrain the State and the Governor's authority. Op. Conn. Atty. Gen., February 8, 2002. Another opinion issued by the Connecticut Attorney General determined a state statute placing restrictions on appointments to the State Workforce Investment Board conflicts with provisions of the Workforce Investment Act and therefore, is preempted by federal law. Op. Conn. Atty. Gen., August 11, 2004.

In accordance with these opinions, whether state or federal law applies to state investment boards may depend on the circumstances. However, with regard to the conduct of meeting by the Board, we must also point out that our position that meetings conducted via telephone are appropriate under State law is based in part on the fact that our FOIA specifically allows for telephonic meeting. However, section 2821, establishing state workforce investment boards, contains its own provision requiring freedom of information particularly in regard to these boards. This provision states:

> (g) Sunshine provision
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> The State board shall make available to the public, on a regular basis through open meetings, information regarding the activities of the State board, including information regarding the State plan prior to submission of the plan, information regarding membership, and, on request, minutes of formal meetings of the State board.

29 U.S.C.A. § 2821(g).

Pursuant to this provision, state boards must hold open meetings. While section 2821 does not give an indication as to the meaning of the term"open meeting," a definition of this term can be found in the Sunshine Act applicable to all federal agencies. 5 U.S.C.A. § 552b. Section 552b of title 5 of the United States Code defines an "open meeting" as "the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business . . . ." Id. § 552b(a)(2).

The definition of "open meeting" under federal law, unlike the definition of "meeting" under FOIA, does not specifically address meetings conducted by means of electronic equipment. Upon

a plain reading of the definition of open meetings under section 552b, feasiblely a quorum of the Board could deliberate, make determinations, and conduct official Board business on a telephone conference call. Thus, certainly one could argue that the definition of an open meeting encompasses telephone conferences. However, in our research we did not discover a federal court decision discussing whether a telephone conference qualifies as an open meeting. Furthermore, in attempting to answer your question, we must keep in mind that "an opinion of this Office is only advisory and questions of federal law ultimately may only be resolved by the United States Supreme Court." Op. S.C. Atty. Gen., January 9, 2007. Thus, without further guidance from the federal courts on whether telephone conferences satisfy the open meeting requirement, we hesitate to advise that Board members may attend meetings via conference call. Nonetheless, to answer your specific questions, should a federal court find meeting conducted by state investment boards via telephone are valid, we believe it would also recognize the attendance of those meeting via telephone. Accordingly, such members would be considered part of the quorum and would be eligible to vote.

Conclusion

Our research indicates a public board acting under state law and in accordance with the South Carolina Freedom of Information Act has authority to conduct its meetings via telephone conference. However, because the Board was created pursuant to federal law and because the Board's enabling legislation contains a sunshine provision specifically requiring the state workforce investment boards hold open meetings, we must defer to federal law to determine whether the Board's meetings may be held via telephone conference. While based on a plain reading of the definition of open meetings under the federal Sunshine Act, one could argue that telephone conferences fall under this definition, federal courts have yet to address this issue. Thus, we caution you and the Board that until the federal courts clarify whether telephonic meetings are valid in these circumstances, such meetings could be subject to invalidation.

Very truly yours,

Henry McMaster
Attorney General

By: Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

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Robert D. Cook
Assistant Deputy Attorney General