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**Philadelphia Board of Ethics
Advice of Counsel**

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Re: Training Question – Boards and Commissions – Conflict Disclosures

At recent ethics trainings for City board and commission members conducted by staff of the Board of Ethics, questions have arisen concerning the City Code's conflict of interest disclosure and disqualification requirement with respect to situations where a board member becomes aware of a conflict of interest just before or at a board meeting at which official action is being taken regarding the entity giving rise to the conflict. This matter was discussed at the Board of Ethics' public meeting of September 17, 2008, and the Board of Ethics delegated this matter to me to provide an Advice of Counsel. This is our analysis of the question and response.

This matter involves two different factual circumstances involving two different statutory requirements. For City boards and commissions, if a member of the board¹ participates as a board member in a matter before the board:

(1) It is prohibited representation, under Code Section 20-602(5), if a partner or employer of the board member is representing a client or the company before the board in that matter; and

(2) It is a prohibited conflict of interest, under Code Section 20-607(b), if the employer of the board member is appearing as a party before the board in that matter.

How the board member avoids the prohibited participation is critical. The Code requires that "prior to any City action" the affected board member is required to send a

¹ For convenience, I will refer to all boards and commissions as "board" throughout this Advice of Counsel.

letter by registered or certified mail disclosing the representation or the financial interest, the pending board action, and disqualifying the member from acting in that matter. The letter must be sent to three places:

- (a) the relevant official at his/her board (chair, secretary, or executive director);
- (b) the Board of Ethics; and
- (c) the Department of Records.

See Code Section 20-608(1)(c).

As noted in the first paragraph above, the questions that we have been asked relate to situations where the affected board member does not learn until (or nearly until) the day of the board meeting that a party is appearing before the board that raises one of these two issues. The issue, then, is whether there is an interpretation of the Code that permits filing of a letter after a matter is presented to, and action taken by, a City board/commission, even though that filing would not then be “prior to any City action thereon.”²

Additionally, I note that those boards and commissions that exercise the power of the City and thus are not merely advisory are subject also to the State Ethics Act. (And if any board has parties appearing before it where action may present a conflict, that board is likely exercising the power of the City.) Section 1103(j) of the Act provides for a similar disclosure and disqualification procedure, including that the official “abstain from voting and, prior to the vote being taken, publicly announce and disclose the nature of his interest as a public record in a written memorandum filed with the person responsible for recording the minutes” 65 Pa.C.S.A. §1103(j).

² Code Section 20-608(1)(c) reads as follows:

Where there is a financial interest, as set forth in Section 20-607(a), by any member of Council or other City officer or employee in any award, contract, lease, case, claim, decree or judgment, other than legislation, the person having such interest, prior to any City action thereon, shall notify, by registered or certified mail, the Commissioner, Secretary and/or Executive Director of the pertinent agency, authority, board or commission, and the Board of Ethics and the Department of Records which shall maintain a public record of such notices; in the event of action within a department or by a department head, such notice by registered or certified mail shall be given, prior to any action taken, to the Mayor, the Managing Director, the Board of Ethics and the Department of Records which shall maintain a public record of such notices.

This Section shall not apply to routine applications or requests for routine information or other matters which are of a ministerial nature and do not require substantial discretion on the part of a City officer or employee.

As an initial matter, situations where board members learn at the last minute of issues involving problematic parties before the board should be the rare exception and not the rule. Board and commission members are responsible for reviewing the agenda and materials of an approaching meeting for potential conflicts of interest. If a board or commission is not providing its members with sufficiently detailed and timely advance notice of the matters and people who will be before them, it is a member's responsibility to insist that the board do what is necessary to give the members sufficient time to comply with the law.

It is not for the Board of Ethics to tell individual boards and commissions of the City how to conduct their business, where the ethics laws are not directly implicated. Moreover, we recognize that all boards and commissions are different, and no single procedure will work for all, as a practical matter. We urge each board and commission of the City to set its agenda for the next meeting in advance, determine the names of parties to appear before it at that meeting, including any attorneys or other professionals to represent each party, as well as sufficient detail about the question to be presented to the board/commission, and provide that information to the members of the board/commission at least a week before the meeting, so that members could review such information to determine whether any issues, parties, or representatives coming before them present issues that may require disclosure under the above-noted Sections of the Ethics Code.

Board members could then review the agenda to determine whether any matter to come before them requires that member's disclosure and disqualification, and send the required letter before the meeting.

If, despite best efforts to be informed of potential conflicts, a board member becomes aware of a conflict so close in time to a meeting that it is not possible to send the required letters prior to the meeting, we recommend that the member request his/her body to postpone official action³ on the related matter until the affected member can comply with Code Section 20-608.

³ "Official action" is not limited to final votes. Section 20-602 refers to a "transaction involving the City," which is defined in Section 20-601(4) to include any "determination, contract, lease, claim, case, award, decision, decree, judgment or legislation." Similarly, Section 20-607 refers in several places to the same list of actions. Clearly, at least "decisions" and "judgments" can include recommendations, discussions, and other actions preliminary to a final vote. The State Ethics Commission has said many times that the "use of authority of office" that constitutes a conflict of interest "includes more than mere voting; for example, it includes discussing, conferring with others, and lobbying for a particular result." *See, e.g.*, Confidential Opinion No. 07-018, at page 6.

If an emergency should arise or other unanticipated situation (such as illness preventing a board member from reviewing materials prior to a meeting) and a matter must be voted on or otherwise considered before a letter can be filed by a board member who is required to comply with the disclosure and disqualification requirements of Section 20-608, we recommend that the affected member publicly announce at the meeting his/her financial interest in the matter and state that the member will not participate, leave the room during consideration of the matter, and as soon as practicable immediately thereafter file the required letters. We recommend following the same procedure where a member becomes aware of a conflict at or close to the meeting because the procedures of the board do not lend themselves to advance notice, and postponement of the matter is also not feasible.

As noted above, in practice this problem seems to arise in one of two ways:

(1) where a partner or employer of the board member represents a client or the company before the board, implicating Code Section 20-602(5); and

(2) where the employer of the board member appears as a party before the Board, implicating Code Section 20-607(b).

In both cases, the problem may be avoided by disclosure and disqualification. As to (1), representation, Code Section 20-602(5) only says "disclose and disqualify himself from such responsibility in the manner set forth in Section 20-608." Members of City boards and commissions are advised that it is the interpretation of the Board of Ethics that "manner" refers to the writing of a letter and the required recipients, but that "manner" may be interpreted to allow for exigencies in timing.

As to (2), conflicts, Code Section 20-607(b) applies only where the City official "has knowledge of the existence of such financial interest" and then requires that the official "shall thereafter disqualify himself or herself" by complying with "Section. 20-608(a) (b) (c)"--presumably (c) for this question. We interpret Section 20-607(b), since it requires "knowledge," to include a reasonable period in the idea of disqualifying and disclosing "thereafter"--so that disqualification could occur publicly on the record at the meeting, with the required letter being sent within a reasonable time, such as 5 calendar days, to apply the time period in Section 20-608(1)(a).

It is noted that (2) also raises an issue under the State Ethics Act, where a conflict of interest under 65 Pa.C.S.A. §1103(a) might require disclosure and disqualification as described in Section 1103(j), cited in the third paragraph of this Advice. Nevertheless, as we say in every advisory opinion involving the Act, the State Ethics Commission is the ultimate arbiter of interpretations of the Act. Please note the

Act provides that: "A public official of a political subdivision who acts in good faith reliance on a written, nonconfidential opinion of the solicitor of the political subdivision . . . shall not be subject to the penalties provided for in [certain provisions of the Act]." 65 Pa.C.S. §1109(g). *See* Charter §4-1100 (giving Law Department concurrent jurisdiction with the Board regarding ethics matters under State law). Since the Board of Ethics is not "the solicitor" of the City, City officials (including board and commission members) have the option to obtain an opinion from the Law Department as to the application of the State Ethics Act. Any such request, to receive the protection, could not be confidential, and will only protect the subject from the criminal penalties in subsections 1109(a) and (b) and from treble damages under subsection 1109(c) of the Act. (A violation of the Ethics Act can still be found, and restitution can still be ordered.) In the absence of any interpretation by the State Ethics Commission of Section 1103(j) on point (and we have found none), you are advised that the provision is co-extensive with the requirements of Code Section 20-608, and thus the same interpretation applies.

Conclusion

In summary, board and commission members are advised: (1) to take whatever steps they can to ensure they are informed of who will be appearing before them in good time so the occurrence of such last-minute situations is minimized; and (2) if such a situation occurs, to request their body postpone official action until they can comply with the Code's disclosure requirements; or (3) if postponement is not practicable, to announce their nonparticipation publicly at the meeting, leave the room during consideration of the matter, and bring themselves into compliance with the Code's requirements as soon as possible. This includes writing and filing a letter that is in full compliance with the requirements of Code Section 20-608(1)(c) no later than 5 calendar days after the Board action.

It is important to note that the "disclosure and disqualification" requirements of the Ethics Code and the State Ethics Act apply personally to individual board and commission members, as City officials. It was suggested at one training that perhaps a board could simply file the minutes of its meeting with the Department of Records, for a member to comply with Code Section 20-608. This is not acceptable. Regardless of its timing, any letter by which a City official discloses an interest and disqualifies himself or herself must comply fully in form with the requirements of Code Section 20-608, including that it be a letter personally signed by that official. If any City official has questions about the application of the ethics laws to their personal situation, they are urged to contact the Board of Ethics for an advisory opinion addressed to their particular facts. The Board's Regulation No. 4 addresses the

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manner of requesting and receiving advice from the Board. Regulation No 4 is posted on the Board's web site at www.phila.gov/ethicsboard.

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cc: Richard Glazer, Esq., Chair
J. Shane Creamer, Jr., Esq., Executive Director