



CITY OF PHILADELPHIA

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**Philadelphia Board of Ethics**  
**Nonpublic Advice of Counsel GC-2009-503**

April 9, 2009

**Re: Board Action Impacting Donors to Board Member's Non-profit Employer/  
Appearance of Impropriety**

A member of a City board/commission requested nonpublic advice on the restrictions the ethics laws place on the member in his or her capacity as an appointee to a City board/commission (the "Board") in light of the member's employment by a university (the "University"), an entity that receives financial support from companies that can be affected by the Board's actions. In particular, the requestor sought advice as to avoiding even the perception of a conflict, and so asked us to address any appearance of impropriety, in addition to the explicit requirements of the applicable Public Integrity Laws.<sup>1</sup>

We advised that, based on the facts presented, there would not be a prohibited

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<sup>1</sup> The Board of Ethics' Regulation No. 2 defines the Public Integrity Laws as "Chapter 4-1100 of the Philadelphia Home Rule Charter, Chapters 20-600 and 20-1000 of the Philadelphia Code, and such other laws and regulations over which the Board has jurisdiction, as well as other matters assigned to the Board by City Council." Reg. 2 ¶ 2.0(a).

conflict of interest under the Public Integrity Laws if the requestor takes action as a Board member that impacts a company that provides financial support to the University. More specifically, the Public Integrity Laws would not prohibit the requestor from voting on a regulation that pertains to products manufactured by companies that provide financial support to the requestor's employer. Under certain circumstances, however, the requestor may wish to disclose the financial interests and relationships at issue involving the University and these companies, and disqualify himself or herself from acting in Board matters that may affect those interests in order to avoid an appearance of impropriety.

The requestor's question in brief was whether he or she can vote as a Board member on regulations that pertain to products manufactured by companies that may support the university that employs the requestor. The requestor informed us that he or she does not personally benefit from these companies but the University does. The University is a nonprofit, and one academic unit (or one school) of the University employs the requestor. For example, the school has received funding from a foundation supported by such a company and that funding has gone to students to assist them with projects. Another such company has supported the creation of "smart classrooms," which have helpful technology. In these ways, the school benefits from industry funding. The requestor stated that he or she was very concerned about a perceived conflict of interest here. The requestor stated that if a company that supports a fund that helps his or her students do certain work and that company is connected to making a product affected by the requestor's Board vote or actions, this could be perceived as a conflict even though the school is a nonprofit. The requestor added that in terms of funding that may come in to the University or to academic units other than his or her own school, the requestor does not have access to that information and cannot always know when such funding comes in.

In keeping with the concept that an ethics advisory opinion is necessarily limited to the facts presented, this advice is predicated on the facts that have been provided to us. We do not conduct an independent inquiry into the facts. Further, we can only issue advice as to future conduct. Although previous opinions of this Board that interpret statutes are guidance to how this Board will likely interpret the same provision in the future, previous opinions do not govern the application of the law to different facts. Ethics opinions are particularly fact-specific, and any official or employee wishing to be assured that his or her conduct falls within the permissible scope of the ethics laws is well-advised to seek and rely only on an opinion issued as to his or her specific situation, prior to acting. In that regard, to the extent that this opinion states general principles, and there are particular fact situations that the requestor may be concerned about, we encouraged the requestor to contact the Board or its staff for specific advice on the application of the ethics laws to those particular facts.

In the requestor's position as a member of the Board, he or she is a City officer. *See* Board of Ethics Opinion Nos. 2007-004 at 2-3 and 2007-006 at 1-2 (concluding that all members of boards and commissions regardless of powers or compensation are appointed officers of the City); City Code §20-601(2) (defining officer or employee to include [a]ny person who is elected or appointed to a position in any branch of the government of the City . . . including, but not limited to members of . . . boards and commissions however elected or appointed . . ."). There is no general requirement that City officers or employees avoid all other financial interests while serving the City, provided that outside work is not performed on the City's time or using City materials or equipment, and conflicts of interest are avoided. In that regard, the Philadelphia Code and the Commonwealth's Ethics Act prohibit certain conduct for a City officer that is relevant to this request.<sup>2</sup>

### **Philadelphia Code—Conflict of Interest**

The general purpose of laws against a "conflict of interest" is to prevent an official from having a conflict between his duty in acting honestly and capably on behalf of the public on the one hand and a personal interest in obtaining or preserving a financial benefit to himself (perhaps indirectly through an employer, relative, or gift-giver) on the other hand. It is desirable to prevent such situations because that official may be tempted to act in a way that benefits that personal interest, to the detriment of the proper execution of his official duties. Even if the official does not actually yield to the temptation of incurring a private benefit to himself, public confidence in the official's decision and in the impartiality of government is undermined by the mere existence of such competing interests.

The Philadelphia Ethics Code prohibits City officers and employees from having conflicts of interest that arise from either having a personal financial interest or from being a member of a business or other entity that has a financial interest in their official decisions. As to a personal conflict of interest, Code Section 20-607(a) provides:

Unless there is public disclosure and disqualification as provided for in Section 20-608 hereof, no member of Council, or other City officer or employee shall be financially interested in any legislation including ordinances and resolutions, award, contract, lease, case, claim, decision, decree or judgment made by him in his official capacity, or by any board or body of which he is a member . . . .

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<sup>2</sup> Two ethics provisions often raised in outside interest situations, Philadelphia Home Rule Charter Section 10-102 and City Code Section 20-602, are not addressed in this advisory, as no issues under those provisions are raised by the facts that have been presented.

Thus, for a personal financial interest that the requestor may have in a Board action (such as if a Board action affecting the university that employs the requestor may impact on the requestor's compensation or continued employment), the requestor must disclose the conflict and disqualify himself or herself from participating in the matter as a member of the Board.<sup>3</sup> In such matters, the Board member must publicly disclose the financial interest and announce an intention to disqualify himself or herself from all official consideration of the matter. Participation that should be avoided would include not only final decisions, but also any preliminary discussion, review, or action.

The requestor advised that he or she personally has no financial interest in any of the support that the companies described in this request provide to the University,<sup>4</sup> its staff or students. Accordingly, as to the requestor's particular question involving Board determinations on products manufactured by companies that provide support to the University, based on the facts provided, we advised that there is no issue under Code Section 20-607(a).

As to conflicts of interest through another entity, Code Section 20-607(b) provides:

In the event that a financial interest in any legislation (including ordinances and resolutions) award, contract, lease, case, claim, decision,

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<sup>3</sup> Section 20-608(1)(c) of the Philadelphia Code spells out the precise procedure for the disclosure required: You should write a letter, which should contain the following elements:

1. State that the purpose of the letter is to publicly disclose a potential conflict of interest;
2. Your public position (member of the Board) and a description of duties relevant to the conflict, if not obvious;
3. Your private position or financial interest (employee of the University) that presents the conflict;
4. A statement of how your public duties may intersect with your private interest (if not obvious from 2 & 3 above); and
5. Your intention to disqualify yourself from any official action in matters affecting the private interest (should indicate that such disqualification precedes any official action being taken in any such matter).

The letter should be sent by certified mail to the following: (1) the Chair, Executive Director, or Secretary of the board in which you would be acting; (2) the Ethics Board, c/o Evan Meyer, General Counsel, Packard Building, 1441 Sansom Street, 2<sup>nd</sup> Floor, Philadelphia, PA 19102; and (3) the Department of Records, Room 156, City Hall, Philadelphia, PA 19107. The letter should indicate on its face that copies are being sent to all three of the above addressees.

<sup>4</sup> The requestor's employer is considered to be the entire academic institution that is the University, not only the academic unit or school the requestor is specifically associated with, because when the Public Integrity Laws refer to employers, it is the corporate entity that is contemplated. For example, in Code Section 20-607(b), an interest in a "member of a partnership, firm, corporation or other business organization" clearly would not refer only to a department of a large corporation.

decree or judgment, resides in a parent, spouse, child, brother, sister, or like relative-in-law of the member of City Council, other City officer or employee; or in a member of a partnership, firm, corporation or other business organization or professional association organized for profit of which said member of City Council, City officer or employee is a member and where said member of City Council, City officer or employee has knowledge of the existence of such financial interest he or she shall comply with the provisions of Section 20-608(a) (b) (c) of this ordinance and shall thereafter disqualify himself or herself from any further official action regarding such legislation (including ordinances and resolutions) award, contract, lease, case, claim, decision, decree or judgment.

Subsection 20-607(b) would not apply to a situation involving the University, since it is a not-for-profit entity and thus there could not be a financial interest arising in a member of “a partnership, firm, corporation or other business organization or professional association organized for profit.”

Note, also, that Section 20-609 of the Code provides that no City officer or employee “shall directly or indirectly disclose or make available confidential information concerning the property, government or affairs of the City without proper legal authorization, for the purpose of advancing the financial interest of himself or others.” If the requestor were to make available to anyone, including to the University or to any funder of the University, any confidential City information learned in service on the Board, the requestor would violate this provision.

### **State Ethics Act**

The State Ethics Act, 65 Pa.C.S. §1101 *et seq.*, applies to the requestor.<sup>5</sup> Section 1103(a) provides:

Conflict of interest. No public official or public employee shall engage in conduct that constitutes a conflict of interest.

What is a “conflict of interest” may be determined by reference to the definitions section of the Act, which includes a definition of that term and terms within its definition, as follows:

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<sup>5</sup> The Act applies only if you are a “public official,” as defined in the Act. The “public official” definition includes members appointed to City boards and commissions, except those that are merely advisory. 65 Pa.C.S. §1102. The Board of Ethics has concluded that the Board is not merely advisory. *See* Opinion No. 2007-006.

Section 1102. Definitions.

The following words and phrases when used in this chapter shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

...

“Authority of office or employment.” The actual power provided by law, the exercise of which is necessary to the performance of duties and responsibilities unique to a particular public office or position of public employment.

“Business.” Any corporation, partnership, sole proprietorship, firm, enterprise, franchise, association, organization, self-employed individual, holding company, joint stock company, receivership, trust or any legal entity organized for profit.

“Business with which he is associated.” Any business in which the person or a member of the person’s immediate family is a director, officer, owner, employee or has a financial interest.

...

“Conflict” or “conflict of interest.” Use by a public official or public employee of the authority of his office or employment or any confidential information received through his holding public office or employment for the private pecuniary benefit of himself, a member of his immediate family or a business with which he or a member of his immediate family is associated. “Conflict” or “conflict of interest” does not include an action having a de minimis economic impact or which affects to the same degree a class consisting of the general public or a subclass consisting of an industry, occupation or other group which includes the public official or public employee, a member of his immediate family or a business with which he or a member of his immediate family is associated.

...

“Financial interest.” Any financial interest in a legal entity engaged in business for profit which comprises more than 5% of the equity of the business or more than 5% of the economic interest in indebtedness.

For the requestor to take official action that has an economic impact on the requestor personally would be a conflict under the State Act in the same way it would be under the City Code. In such a case, Section 1103(a) would restrict the requestor's activities as a public official relative to the use of authority of his or her office to obtain a private pecuniary benefit for himself or herself, and would require disclosure and disqualification, as set out in City Code Section 20-608(c), prior to any City action being taken, as described in footnote 3 above. *See* 65 Pa.C.S. §1103(j). As noted above, the requestor advised that he or she has no personal financial interest in any of the support provided by the manufacturers to the requestor's employer, so there is no issue of a personal conflict of interest.

The State Act also prohibits taking official action that benefits "a business with which you are associated," and the application of this prohibition turns on the definition of "business." In 2008, the Commonwealth Court ruled that the definition of "business" in the State Ethics Act does not include nonprofit entities. *See Rendell v. McGinty*, 961 A.2d 209, 216 (Pa. Commw. 2008). This ruling eliminates a previous difference between the State Act and the City Code about whether a relationship with a non-profit can give rise to a conflict of interest. Under the City Code, if you are an officer or member of a nonprofit, you may take official action affecting that nonprofit if you have no personal financial interest; there is no conflict. But prior to *Rendell v. McGinty*, under the State Act, that nonprofit would have qualified as a "business with which you are associated," and you would have had a conflict. That difference between the Code and the Act regarding the status of non-profits is now removed, and under both laws non-profits generally do not give rise to conflicts. However, an appeal is pending before the Pennsylvania Supreme Court in a related case, *Rendell v. Pa. State Ethics Comm'n*, 938 A.2d 554 (Pa. Commw. Ct. 2007), *allowance of appeal granted*, 958 A.2d 1044 (October 16, 2008), that could potentially result in this ruling being overturned. For now, it is this Board's conclusion that the Commonwealth Court ruling is the law in Pennsylvania, and a nonprofit is not a "business" under the State Ethics Act.

Therefore, we advised that under the State Ethics Act there would be no prohibited conflict of interest for the requestor to take official action that has an economic impact on the university that employs the requestor, so long as the requestor personally has no financial interest in the matter.

Moreover, even if the Supreme Court were to overturn *Rendell v. McGinty* and rule that nonprofits are "businesses" for purposes of the State Ethics Act, it is still unlikely that the facts that the requestor described would amount to a "conflict of interest" prohibited under the Act. This is because under the requestor's facts he or she would be taking official action that could have a positive financial impact not on a business with which the requestor is associated, but on a donor to a business with which the requestor is associated. There would not be a prohibited conflict of interest because

the requestor is not a director, officer, owner or employee of the donors and the requestor would not have a financial interest in those companies as that term is defined by the Act. Even if a Board action directly resulted in a significant financial benefit to a certain manufacturer, and even if the associated profit should induce that manufacturer to increase the amount of funding it provided to the University that is still a rather tenuous connection to be considered a “private pecuniary benefit” to the University from the Board action.

Nevertheless, the State Ethics Commission is the ultimate arbiter of interpretations of the Act. In particular, with respect to the impact of *Rendell v. McGinty*, note that a recent Advice of Counsel of the State Ethics Commission states: “[A]nswers to questions regarding the proper application of the definition of the term ‘business’ as set forth in the Ethics Act are dependent upon the outcome of the State Ethics Commission’s aforesaid appeal pending before the Supreme Court of Pennsylvania.” Confidential Advice No. 09-506 at 4 (February 5, 2009).

Please note that 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 [the Act].” 65 Pa.C.S. §1109(g). Since the Board of Ethics is not “the solicitor” of the City, requestors 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.) Alternately, you may wish to apply directly to the State Ethics Commission for a ruling.

### **Appearance of Impropriety**

This Advice advises that, under the facts presented, there would not be a prohibited conflict of interest under the Public Integrity Laws. The requestor asked to receive the advice of this Board, not only on the law, but also on how to avoid any appearance of impropriety. The requestor is to be commended for being sensitive to the spirit, as well as the letter, of the law. Since no law prohibits an “appearance of impropriety,” this brief discussion on the topic is non-binding guidance that responds to the requestor’s concern about *perceived* as opposed to actual conflicts of interest.

Situations in which there is no conflict of interest under the letter of the law can nevertheless create appearances of impropriety. Although there is no formal definition of “appearance of impropriety” in the laws under which this Board has jurisdiction, generally there is an appearance issue any time there is a possible public perception that improper influence was being exerted upon a public official or that a public official’s

personal interest in a matter is so substantial that it would be difficult to resist the temptation to act in favor of that interest. Although the Public Integrity Laws prohibit conflicts of interest, not appearances of impropriety, and an enforcement action could not be brought based on an appearance of impropriety, appearances of impropriety can be damaging to public confidence in government.

Under the facts the requestor presented with this request to the Board of Ethics, the financial interests at issue are too indirect to be covered by the relevant conflict of interest statutes. Still, an outside observer may think it likely that the requestor would be influenced when voting as a member of the Board on a regulation that relates to a company's products because that company had provided generous support to the requestor's employer. Indeed the requestor expressed a concern about public perception in his or her request for advice. In response to that concern, we advised that should the Board be in the position of taking action that impacts a product where the decision will have a significant financial effect on the manufacturer of the product, and where the same manufacturer is providing or has recently provided the University that employs the requestor, its students, or faculty with substantial funding or in-kind contributions, then—in the interest of enhancing public confidence in government and avoiding any appearance of impropriety—the requestor should consider following the disclosure and disqualification process of Code Section 20-608, as outlined in footnote 3.

### **Financial Disclosure**

As a City officer, the requestor is required to disclose all sources of income, which includes compensation as an employee of the University, in the financial disclosure forms that must be filed each May 1. The forms would also require the requestor to disclose any income received from any companies if such income was received and it was over the applicable threshold amount.

### **Conclusion**

Based on the facts the requestor supplied, we conclude that if the requestor takes action as a Board member that impacts a company that provides financial support to the university that employs him or her, this would not cause a prohibited conflict of interest under the Public Integrity Laws. The requestor may wish to go beyond the minimum requirements of the Public Integrity Laws and avoid appearances of impropriety by choosing to disclose the relationships and financial interests at issue and disqualify himself or herself from participating in the Board actions in such situations.

We informed the requestor that if he or she has any additional facts to provide, we will be happy to consider if they change any of the conclusions in this opinion. Since the requestor sought nonpublic advice from the Board of Ethics, we are making public a

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revised version of this advice, edited to conceal the requestor's identity, as required by Code Section 20-606(1)(d)(iii).

Evan Meyer  
General Counsel

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