CITY OF PHILADELPHIA

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Philadelphia Board of Ethics
Nonpublic Advice of Counsel GC-2010-519

December 16, 2010

Re: Handling Pre-Candidacy Contributions

The treasurer of a "Friends of" committee requested nonpublic advice on the following question:

> I would like to request a private opinion regarding the ability to use funds that have been raised in an exploratory committee. When the time comes and the support is such that the committee will no longer be exploratory the name will be amended with the proper departments. Please advise as to if this would be enough to then use the funds that have been accumulated.

It is presumed that the reference to "When the time comes" means when the subject individual publicly declares his candidacy for a City elective office.

In keeping with the concept that an ethics advisory opinion is necessarily limited to the facts presented, my advice is predicated on the facts that I have been provided. We do not conduct an independent inquiry into the facts. Further, we can only issue advice as to future conduct. Accordingly, this Advice does not address

anything that may have occurred in the past. The requestor was advised that, although previous opinions of this office that interpret statutes are guidance to how this office 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, he was encouraged to contact us for specific advice on the application of the ethics laws to those particular facts.

It is understood that this inquiry is solely as to the requirements on the political committee under Chapter 20-1000 of the Philadelphia Code relating to the disposition of funds it accumulates prior to the individual's declaration of candidacy for City elective office.

Please note that amended Regulation No. 1 (Campaign Finance), which became effective on September 27, 2010, supersedes (to the extent they are inconsistent) prior Advices of Counsel and Board of Ethics opinions that interpreted Chapter 20-1000 of the Philadelphia Code. Hereinafter, this Advice will refer to Regulation No. 1 as "Reg. 1."

Application of State Election Code

The Pennsylvania Election Code (25 P.S. § 3241, *et seq.*) provides the rules for how to set up political committees and candidates' authorized political committees. The Board does not have any jurisdiction over the state election code cannot provide guidance on that law. The requestor was advised that if he has questions about the Pennsylvania Election Code, he should contact either the Secretary of State's Bureau of Commissions, Elections and Legislation or the City Commissioners.

It was understood that, if the individual declares his candidacy for City office, the requestor will amend the Political Committee Registration Statement that was filed with the City Commissioners to change the name of the committee and designate it a candidates' authorized political committee. Whether such an amendment is permissible is a question of State law which the Board of Ethics has no authority to interpret. However, for the purposes of this advice, it was assumed that such an amendment is permissible.

Code Chapter 20-1000

Under the City's campaign finance law, a person does not become a candidate until he or she has either filed nominating papers or publicly declared his or her candidacy. *See* Reg. 1, Paragraph 1.1(c). The formation of a political committee, even a candidate's authorized political committee, does not, on its own, constitute a public declaration of candidacy under the City's campaign finance law. Please note that the City's definition of candidate is different from the definition of candidate under the State Election Code. The fact that the individual is not a candidate under the City's campaign finance law does not relieve him of his obligation to comply with the State Election Code.

Once the individual either files nominating papers or publicly declares his candidacy, he will be subject to the City's campaign finance law, including the contribution limits and the rules regarding excess pre-candidacy contributions. A pre-candidacy contribution, as defined by Paragraph 1.1(s) of Reg. 1, is:

> A contribution made to a political committee that: (a) has been transferred to, or otherwise becomes available for expenditure by, a candidate for City elective office; and (b) was made before such candidate became a candidate.

An excess pre-candidacy contribution, as defined by Paragraph 1.1(j) of Reg. 1, is:

> The portion of a pre-candidacy contribution to a political committee that, had it been made to a candidate for City elective office, would have been in excess of the contribution limitations set forth in Sections 20-1002(1) or 20-1002(2) of the Philadelphia Code.

Neither the individual nor his candidate political committee may spend any excess pre-candidacy contributions for the purpose of influencing the outcome of a covered election in which the individual is a candidate. *See* Paragraph 1.12 of Reg. 1. If the individual establishes a litigation fund committee, he may not transfer excess pre-candidacy contributions to that committee. *See* Paragraph 1.13 of Reg. 1.

In addition, pursuant to Paragraph 1.14 of Reg. 1, the individual may not spend any excess pre-candidacy contributions for the purposes of:

a. Transition or inauguration expenses; or

b. Retiring debt that was incurred to (i) influence the outcome of an already completed covered election; or (ii) cover transition or inauguration expenses related to an already completed covered election.

Pursuant to Paragraph 1.15 of Reg. 1, the individual must exclude all excess pre-candidacy contributions from his candidate political committee checking account by one of the following methods:

a. Transferring excess pre-candidacy contributions to a segregated pre/post-candidacy excess contribution account ("SPEC" account) within ten days after he becomes a candidate; or

b. Returning excess pre-candidacy contributions to the contributors who made those contributions within ten days after he becomes a candidate.

Neither the individual nor his candidate political committee may use money held in a SPEC account to influence the outcome of a covered election in which he participates. *See* Paragraph 1.17 of Reg. 1.

Within seven days of establishing a SPEC account, the individual must notify the Board of the name of the bank at which the account was established. This notification must be sent by postal mail or email sent to the attention of the Board's Executive Director.

Please note that excess pre-candidacy issues will only arise if the individual accepts pre-candidacy contributions of more than $2,600 per individual or $10,600 per political committee. Thus, if he only accepts pre-candidacy contributions within the limits, he will not need to set up a SPEC account.

Conclusion

It was our understanding that, if the individual declares his candidacy for City office, the committee will amend the Political Committee Registration Statement that was filed with the City Commissioners to change the name of the committee and designate it a candidates' authorized political committee. It is our understanding that the requestor was requesting nonpublic advice as to the requirements on the committee under Chapter 20-1000 of the Philadelphia Code relating to the disposition of funds it accumulates prior to the individual's declaration of candidacy.

Based on the facts that the requestor provided to us, he was advised as follows:

1. Under the City's campaign finance law, the individual will not become a candidate until he either files nominating papers or publicly declares his candidacy.

2. Neither the individual nor his candidate political committee may spend any excess pre-candidacy contributions for the purpose of influencing the outcome of a covered election in which the individual is a candidate.

3. If the individual establishes a litigation fund committee, he may not transfer excess pre-candidacy contributions to that committee.

4. The individual may not spend any excess pre-candidacy contributions for the purposes of:

a. Transition or inauguration expenses; or

b. Retiring debt that was incurred to (i) influence the outcome of an already completed covered election; or (ii) cover transition or inauguration expenses related to an already completed covered election.

5. The individual must exclude all excess pre-candidacy contributions from his candidate political committee checking account by one of the following methods:

a. Transferring excess pre-candidacy contributions to a segregated pre/post-candidacy excess contribution account ("SPEC" account) within ten days after he becomes a candidate; or

b. Returning excess pre-candidacy contributions to the contributors who made those contributions within ten days after he becomes a candidate.

6. Neither the individual nor his candidate political committee may use money held in a SPEC account to influence the outcome of a covered election in which he participates.

7. Within seven days of establishing a SPEC account, the individual must notify the Board of the name of the bank at which the account was established, via postal mail or email sent to the attention of the Board's Executive Director.

The requestor was advised that, if he 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 requested nonpublic advice from the Board of Ethics, we will not make the original letter public, but are required to make public this revised version, 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