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Philadelphia Board of Ethics
Advice of Counsel

January 2, 2008

Lawrence J. Beaser, Esq.
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Re: Nutter Inaugural Committee—Gift Issues

Dear Mr. Beaser:

You have advised that you represent Mayor-elect Michael A. Nutter with respect to matters related to inaugural activities to be sponsored by the Nutter Inaugural Committee, a Pennsylvania nonprofit corporation. By your letter of December 28, 2007, you refer to Opinion No. 2007-005, which the Board of Ethics had issued on December 18, 2007, advising you on issues under City Code Chapters 17-1400 and 20-1000, related to fund-raising by the Committee. Your letter notes that Opinion No. 2007-005 had, at your request, deferred consideration of any gift issues, until you could provide more factual detail concerning the inaugural events and the fund-raising for the same. You are now requesting that advice.

The Board has authority to issue advisory opinions, under Section 4-1100 of the Charter and Section 20-606(1)(d) of the Philadelphia Code. The Board may also issue regulations further providing for the form and procedure for such opinions, but has not yet done so. In the absence of formal regulations, the Board has authorized its General Counsel to issue advice based on the ethics laws and on prior opinions in matters where referral to the full Board for a formal opinion is deemed to be unnecessary due to time constraints, clear prior precedent, or other

considerations. In this matter, since the inaugural is days away, the Chair of the Board has authorized me to issue an Advice of Counsel. The Chair has communicated this decision to the members of the Board, along with the general principles involved, and has received no objection to that procedure. In light of the responses from individual Board members, particularly on the appearance issues, I can represent that the conclusions on such matters in this Advice represent the views of the Board as a whole. Since you have not requested a confidential advisory, this Advice will be made public, as required by Code §20-606(1)(d)(iii).

Summary of Conclusions

You are advised that there would be no issue of a violation of any ethics provision prohibiting gifts to City officials and employees, including Mayor Nutter, provided that donations are made to the Nutter Inaugural Committee. You are advised that any appearance issues are minimized by the limits on donations, the fact that there is no direct gift to any particular City official or employee, and the fact that the value of any benefit to any particular individual is not significant. Nevertheless, how each event is organized and funded, and how donations are solicited and acknowledged may present appearance issues, if organizers are not careful in how publicity is handled. Otherwise, it may not be possible to avoid a possible public perception that donors are purchasing influence. Therefore, the planned event should be structured so that donations are solicited by private individuals, not by City officials, that such donations are made to the Nutter Inaugural Committee, not the City, and that the names of individual donors to the Nutter Inaugural Committee for this purpose should not be given prominent publicity, as discussed on pages 7-8 below. Under these circumstances, you are advised that, to the extent that attendance at each event, whether complimentary or at a discounted ticket price, constitute gifts, they are gifts to the City and thus not gifts at all to the individual recipients.

Introduction

You advise that there will be three events on January 7, 2008, that will be sponsored by the Nutter Inaugural Committee. The first is a Mentorship Luncheon, sponsored by the Committee for students and mentors. The Mayor will be speaking and will presumably receive his lunch as a guest of the Committee. The second event is a Sponsors' Reception, open to all sponsors who donate to the Committee. You have advised that this reception will involve refreshments and some musical entertainment. You have advised, by e-mail on December 31, that this event is being hosted by Urban Outfitters up to a cost of $10,000, with any excess cost borne by the Committee. The third event is the Inaugural Gala, which is open to the public at a ticket price of $50. The new Mayor, his wife and

daughter, and some City officials may be invited to both of these events as guests of the Committee. The receipt of donations and the acceptance of free food and drink at these events by the Mayor and other City officials raises issues under the ethics provisions that restrict the acceptance of gifts by City officials and employees.

As a matter of applying the ethics laws, it is immaterial whether the donors make contributions directly to the City or to the Nutter Inaugural Committee, which in turn bears the expenses of the events. We understand that it is the purpose of nonprofit organizations like the Nutter Inaugural Committee to accept donations that might not otherwise be accepted and spent by particular City offices. See Advice of Counsel of September 12, 2007. Moreover, as will be discussed below, I conclude that any appearance of influence would be lessened if individual donors donate through the Committee, rather than more directly, and that any public acknowledgement of such donations from particular donors was minimized. Accordingly. I approve the concept of the Nutter Inaugural Committee accepting the donations, rather than individual donors transmitting payments directly to the City.

There are a number of ethics provisions that relate to gifts: Sections 1103(b) and (c) of the State Ethics Act, Section 10-105 of the Charter, Section 20-604 of the Philadelphia Code, and Executive Order No. 002-04. The State Ethics Act provisions prohibit only gifts where there is an understanding that the recipients would be influenced. It is assumed that is not the case here. The Charter provision prohibits gifts given for an act or omission in official work. Even if some City officials attend events on a complimentary or discounted basis, I conclude that there would not be a direct link between any gift at such an event and a particular official action, and thus the Charter provision does not apply. The Code and the Executive Order require more analysis.

Executive Order No. 002-04

As a threshold matter, I first address the effect of the Executive Order. In general, executive orders are not law. They are more in the nature of a directive from an executive officer to his subordinates. See Client News No. 96-3, *1994-1996 City Solicitor's Opinions* at 273; *Shapp v. Butera*, 348 A.2d 910, 913-14 (Pa. Commw. 1975) (*cited in Cutler v. State Civil Service Comm'n*, 924 A.2d 706, 712 (Pa. Commw. 2007)). They may not be enforced in court, and the City has no mechanism for adjudicating violations of executive orders and imposing fines. Rather, executive orders may be enforced by the same kind of employment action that would result from any kind of disciplinary procedure that may be imposed by an employer upon his or her subordinates, typically suspension, demotion or

discharge. Nevertheless, in the past the City, without objection from the Mayor's Office, has typically looked to the City Solicitor's Office and the prior, advisory Board of Ethics to interpret Mayors' executive orders. See, e.g. Opinion No. 99-10, *1997-1999 City Solicitor's Opinions* at 341 and Opinion No. 98-08, *1997-1999 City Solicitor's Opinions* at 189 (advising various officials on the effect of Executive Order No. 8-93 creating the Police Advisory Commission); Opinion No. 95-28, *1994-1996 City Solicitor's Opinions* at 177 n.4 (advising on effect of executive order on Education Advocate); Opinion No. 95-15, *1994-1996 City Solicitor's Opinions* at 125 (advising Procurement Commissioner on effect of Executive Order No. 1-93 on minority business enterprise); Opinion No. 87-11, *1986-87 City Solicitor's Opinions* at 151 (interpreting Executive Order No. 8-86 on procurement); as well as numerous opinions of both the Law Department and prior advisory Boards of Ethics, interpreting the various gift executive orders over the years. The Mayor certainly may, at any point, revise an executive order, or issue an interpretation of it. However, in the absence of any such action or of any indication that the sitting Mayor does not intend the Board of Ethics to interpret executive orders relating to ethics, the Board of Ethics will continue the existing practice of interpreting such directives.

Executive Order No. 002-04 was issued by Mayor Street on August 12, 2004. It prohibits gifts of any kind from various sources to any officer or employee in the Administrative and Executive Branch. There are a few exceptions, but no minimum value of gift that is *per se* acceptable. Gifts from sources not listed in Section 1 of the Executive Order would be permissible. Potentially prohibited sources are broadly defined to include almost any person or entity located within the City limits, or that is ever regulated, taxed, or provided public services by the City, or that does business or is likely to seek to do business with the City. It is likely that most of those approached to contribute or who do contribute to the planned celebration will be potentially prohibited sources.

You have argued that the Nutter Inaugural Committee is not a source under Section 1. Specifically, you contend that the Committee is not "a person[1] whose operations or activities are regulated or inspected by any City agency" or "a person whose interests may be substantially affected by the performance or nonperformance of [the] official duties [of any official who receives an applicable gift]." This argument, on its face, has some appeal. We have not been advised whether the Committee has its own staff or office, such as would subject it to City regulation for any activity performed within the City limits. Presumably,

[1] The Executive Order defines "person" to include "a natural person or a business, governmental body, individual, corporation, union, association, firm, partnership, committee, club or other organization or group of persons, or agents thereof." Section 1(3). The Nutter Inaugural Committee is clearly a "person" under the Executive Order.

however, the Committee will be renting venues in the City in which to hold the Sponsor's Reception and perhaps other events (although we are advised that the Inaugural Gala will be held at the Navy Yard, which may not be subject to City regulation as a federal facility).

As the renting entity, the Committee may be responsible for any issues that could arise that might involve City government, such as Fire Code issues, police protection, and trash collection. Moreover, you advise that the Committee is still in the process of seeking tax-exempt status from the IRS. Should there be any issue concerning that status, there might well be an issue involving the City's licensing and taxing entities, as well. Also, the very fact that the Committee is involved in this request to the City's Board of Ethics points out the possibility of City action, as, for example, if the Board were to determine that the Committee had made an illegal gift or campaign contribution. Most importantly, if we were to conclude that Section 1 of the Executive Order did not apply to the Committee, we might well create a precedent that would make it difficult for us to apply the Executive Order to a different situation where a nonprofit is actually offering improper gifts in an attempt to influence a City official.

I conclude, therefore, that the Nutter Inaugural Committee is a source identified in Section 1 of the Executive Order as being subject to City action, and thus a source from which gifts may not be made to City officers or employees, unless an exception applies[2]. Hence, the only question is whether any exception applies to donations for these events.

As you note, only one of the exceptions listed in Section 2 of Executive Order No. 002-04 arguably applies to the proposed program of soliciting and receiving donations of monetary contributions to defray the cost of the celebration, the provision of free or reduced attendance by some invitees, and the refreshments and entertainment to be offered. The only exception that might arguably apply is as follows:

> (c) Acceptance of food and refreshment at a public event or ceremony sponsored by a non-profit, community or civic organization, and attended by the employee or official in his/her official capacity.

It has never been entirely clear what Section 2(c) means by "a public event . . sponsored by a non-profit . . . ." There are probably very few events completely open to the public free of charge, and at which a non-profit offers free food to all who attend, and so this may not have been what the Mayor intended. Previous

[2] Many individual donors may well also be potential prohibited sources, but the analysis is the same, as will be discussed below.

opinions of the predecessor advisory Board of Ethics and the Law Department did not apply this exception to an invitation-only event or an event that charged admission, limited only to members of a certain organization. Without deciding precisely what is meant by "a public event sponsored by a non-profit, community or civic organization," I conclude that, under the facts that you have provided, where the public is invited to attend, at a reasonable cost, an event celebrating the inauguration of a new Mayor, and sponsored by a nonprofit created solely for that purpose, the exception in Section 2(c) of the executive order applies. Accordingly, the offer of, or receipt by, any City official or employee who attends the Inaugural Gala, whether as a guest of the Committee or having purchased a ticket at a discount over the per person cost of the event, would not raise any issue under Executive Order No. 004-02. This conclusion applies regardless of whether the donor of any "gift" is considered to be the Committee or any individual contributors to the Committee.

However, I cannot accept your argument that the same analysis applies to the Sponsors' Reception, where a member of the public could only attend by donating at least $2,500 to the Committee. Accordingly, you are advised that the exception in Section 2(c) of the executive order does not apply to the Sponsors' Reception.

As to the "gift to the City" exception, although the City Solicitor's Office and our predecessor board, the advisory Board of Ethics, have both allowed City employees to accept certain gifts as a "gift to the City," the advisory Board had spelled out, in a number of rulings, the criteria:

- The gift must not simply be offered to and accepted by the City employee receiving the benefit of the gift.
- Instead, the private entity wishing to make a gift to the City, such as attendance at a dinner or conference by certain mid-level managers, must make the offer to the appointing authority of any officials invited to attend, so that appointing authority can approve acceptance and then make the decision as to which City employee/official is the logical person to represent the City at the dinner or conference.
- The recipient official's appointing authority must be able to articulate a defensible justification as to a legitimate governmental purpose of the City that is advanced or assisted by the acceptance of this gift.
- In determining whether a gift is justifiable, the official should consider whether the City would be willing to expend funds out of the City budget for a similar purpose.

See Opinion Nos. 2004-01, 2004-02, and 2005-01 of the former, advisory Board of Ethics (all posted on the Board's web site). For the purpose of the above

criteria, it can be difficult to define the "appointing authority" when such a gift is offered to the Mayor and other high officials. In such a case, we believe it is up to the Board of Ethics to determine whether there is "a defensible justification as to a legitimate governmental purpose of the City that is advanced or assisted by the acceptance of this gift." I conclude that there is a legitimate governmental purpose in an incoming Administration hosting a celebratory event to encourage public involvement in City government and establish good relations between the public and the Administration. Indeed, you advise that on January 7, 2008, City Council will be hosting a public inaugural event to be paid with public funds. Accordingly, I conclude, and you are advised that any expense borne by the Nutter Inaugural Committee, and any donations to the Committee (to the extent that such donations may be considered to be indirect gifts from a potentially prohibited source) will be permissible "gifts to the City." Thus, attendance at any such events by City officials, including Mayor Nutter, at either no cost or a discounted cost, will not represent a gift to those officials at all.

Nevertheless, how the events are organized and funded, and how donations are solicited and acknowledged may present appearance issues, if not conducted in a way to avoid a possible public perception that donors are purchasing influence.

You have advised that the fund-raising for the planned events is arranged so that donations are solicited by private individuals, not by City officials. It is planned that such donations would then be made to the Nutter Inaugural Committee, and the Committee will bear the expenses of the events. The ethics laws do not restrict actions of a City official that "have the appearance of impropriety." Accordingly, there would be no violation of law if our advice below is not followed. Nevertheless, the Board has broad authority to suggest measures to enhance public confidence in government. See, e.g., Code §20-606(1)(l)(ii). The Law Department discussed "appearance of impropriety" in a Client News (these Law Department newsletters are not legal advice) issued in 2000. The Client News referred to a "Guide to Ethical Conduct for City Officers and Employees," adopted by the City Board of Ethics and published in the Board of Ethics addendum in the volume 1982 City Solicitor's Opinions at page 306. The Guide states: "[I]mproper appearances may be as or more detrimental than actual conflicts to the public's confidence in City government. Situations of apparent impropriety should be avoided wherever possible." The concept here is that in a particular situation, a City employee may want to consider whether a possible public perception would be that improper influence would be exerted where donations fund a benefit to the employee, even though no legal issue arises under any of the above-cited ethics laws.

In this regard, the Board is concerned with the level of acknowledgement proposed for donors to the Nutter Inaugural Committee. In

particular, in your letter of December 28 (attached), you identify four "levels of giving." We have no concerns about the first two levels, Sponsors who give $2,500 or $5,000. You advise that Sponsors who donate at least $7,500 will receive, in addition to other recognition, the inclusion of the company logo on a banner on display at the Sponsors' Reception and the Inaugural Gala. Sponsors who donate $10,000 will in addition, according to your letter, "be listed by the Inaugural Nonprofit in the Inaugural Nonprofit's news releases identifying such sponsors as 'title sponsors.'" Such public display of the names of major donors may indicate to the public which businesses are major "players" in dealing with City government and give the impression of undue access to City officials, undermining public confidence in the fairness and openness of City government. The Board would suggest a less public acknowledgement of such gifts, such as by eliminating the banners and the reference in news releases. In addition, the Board would recommend that, as to the Sponsors' Reception hosted by Urban Outfitters, the Committee should provide Urban Outfitters with no more recognition than that accorded to other donors of $10,000 to the Committee.

Philadelphia Code

Section 20-604 of the Code provides:

> § 20-604. Gifts, Loans and Favors to City Personnel.
>
> (1) No member of Council or other City officer or employee, shall solicit, accept or receive any gift, loan, gratuity, favor or service of substantial economic value that might reasonably be expected to influence one in his position in the discharge of his official duties, from any person, firm, corporation or other business or professional organization.
>
> (2) No person, firm, corporation or other business or professional organization shall offer, make or render any gift, loan, gratuity, favor or service of substantial economic value to any member of Council or other City officer or employee which might reasonably be expected to influence such officer or employee in the discharge of his official duties.

Whether a party is a gift "of substantial economic value" is an interesting question, particularly in respect to a single donor, where the cost to the donor may be substantial, but the value to any one attendee may only be what the fair market value of a ticket or discounted ticket to such an event would be, which might well be less than $200 or $300. Nevertheless, the City Solicitor concluded in 1990 that a $7000 party was "of substantial economic value" when the entire cost was borne by one donor. Opinion No. 90-30, *1990 City Solicitor's Opinions* at 87. Whether

the circumstances might "reasonably be expected to influence" any City official recipients depends in part on the value and in part on whether the donor is a person or entity that might be affected by the official's performance of his/her official duties. This is not the same analysis as whether a donating entity is a potentially prohibited source under Section 1 of the executive order. An entity might be a prohibited source under the executive order, and yet the total circumstances of the reason for that determination, the occasion for the gift, the value of the gift, the identity of the recipients, and the likelihood of the recipients being presented with any City official action that might affect the source may well all amount to circumstances where the gift cannot be said to be one that "reasonably [would] be expected to influence" the official/employee who receives the gift. I conclude that the nature of the Nutter Inaugural Committee is such that there is unlikely to be any official action that any of the invited officials might take that could affect the financial interests of the Committee. Accordingly, I conclude that any gift from the Committee of free or reduced attendance at one of the events could not be said to be "reasonably expected to influence" such officials. Nor is there any language in Section 20-604 that can be read to make a donation to the Committee equate to a gift to a City official attending an event sponsored by the Committee. The sponsorship, up to $10,000, by Urban Outfitters of the Sponsor's Reception[3] makes this event a close question, but arguably the gift to Mr. Nutter is only the value of the food he eats and market value of a ticket to enjoy the same entertainment, which would not be "of substantial economic value." Thus, I conclude and you are advised that there would be no issue under Code Section 20-604. Also, similar to the discussion of appearance issues under the Executive Order above, I conclude that the same considerations apply, and my advice is the same as to the method of obtaining and publicizing contributions.

Sincerely yours,

Evan Meyer
General Counsel

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

[3] Prior to December 31, 2007, there was no suggestion that any events would be sponsored solely by any person or entity, but that all events would be hosted and paid for by the Nutter Inaugural Committee.

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December 28, 2007

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Re: Request for Guidance - Gift Issues Raised In Philadelphia Board of Ethics Opinion No. 2007-005

Dear Mr. Creamer:

As you are aware, we represent Mayor-Elect Nutter with respect to issues involving Philadelphia Board of Ethics Opinion No. 2007-005 ("Opinion 2007-005").

This request for guidance is in response to a number of issues raised in Opinion 2007-005. Specifically, on pages 4 and 5 of Opinion 2007-005, the Ethics Board raised the issue as to ". . .whether the Mayor-elect's attendance at such an event constitutes his receipt of a gift perhaps prohibited or restricted by the ethics laws."

The Opinion noted that I had requested that the Board initially only address questions involving Code Chapters 17-1400 and 20-1000 and that I would submit a request for additional guidance with respect to gift issues once details regarding the inaugural events had been finalized. The details of the inaugural events have now been finalized and this letter is that additional request for guidance concerning the attendance of the Mayor-elect and his representatives at events organized to celebrate the democratic transition to and commencement of a new City administration.

Background

As noted in my previous letters, inaugural activities will be sponsored by the Nutter Inaugural Committee, a Pennsylvania nonprofit corporation formed to commemorate and celebrate the inauguration of Mayor-Elect Nutter and intended to be exempt from federal taxation as a social welfare organization pursuant to § 501(c)(4) of the Internal Revenue Code (the "Inaugural Nonprofit").[1]

[1] The other nonprofit mentioned in my previous letters, A New Day, A New Way, will not be involved in inaugural activities. Thus, the activities of A New Day, A New Way are not addressed in this letter.

Also as noted in my prior letters, Mayor-Elect Nutter will not serve as an officer or director of the Inaugural Nonprofit. The Inaugural Nonprofit does not have members and will be operated by its officers and board of directors, none of whom are or will be City officers or employees during their terms of service as an officer or director of either corporation. Board members are and will not be appointed by City officers or employees. Mayor-Elect Nutter will not solicit funds for the Inaugural Nonprofit.

Donations will be solicited by the officers and board members of the Inaugural Nonprofit, none of whom are or will be City officers or employees at the time donations are solicited. Donations will not be accepted from political committees. The Inaugural Nonprofit will not solicit donations after Mayor-Elect Nutter becomes mayor and will not have any operations beyond those related to the inaugural events. As has been discussed previously with the Ethics Board, the names of all contributors to the Inaugural Nonprofit (as well as A New Day, A New Way) will be publicly disclosed, whether or not such disclosure is required by law.

Also as previously stated, in accordance with the publicly announced wishes of Mayor-Elect Nutter, each nonprofit corporation will limit the amount it will accept from each individual and/or entity. Total donations may not exceed (in the aggregate for the Inaugural Committee and A New Day, A New Way) $2,500 per individual and $10,000 per entity.

The Inaugural Nonprofit will seek sponsors to defray the costs of inaugural activities. In particular, through contributions, the Inaugural Nonprofit intends to subsidize the cost of the tickets to the inaugural gala (the "Inaugural Gala") in order to increase public participation. Tickets to the Inaugural Gala will be available to the general public for $50 per ticket. It is anticipated that the cost per person for the Inaugural Gala will be greater than $50 per ticket. It is not at all unusual for nonprofits to subsidize admissions prices through the solicitation of sponsorships, and, like other nonprofit organizations, the Inaugural Nonprofit will offer different types and levels of recognition to its sponsors. The Inaugural Nonprofit, however, will not limit the number of sponsorship opportunities available at any level of contribution.

The Inaugural Nonprofit has established four levels of sponsorship recognition by the Inaugural Nonprofit that will accompany four levels of giving: $2,500; $5,000; $7,500, and $10,000:

Sponsors who donate $2,500 will receive 4 tickets to the Inaugural Gala (with a face value of $50 each) and two tickets to the thank you event for sponsors (the "Sponsors' Reception"), each of which is described below.

Sponsors who donate $5,000 will receive ten Inaugural Gala tickets and two Sponsors' Reception tickets and special acknowledgement by the Inaugural Nonprofit's representatives during the brief program at the Sponsor's Reception ("verbal acknowledgment").

Sponsors who donate $7,500 will receive ten Inaugural Gala tickets, six tickets to the Sponsors' Reception, verbal acknowledgement, and commemorative copies of photographs taken at the Sponsors' Reception ("reception photographs"). In addition, the company logo of such sponsors will be included with that of other sponsors on a banner on display at the Sponsors' Reception and the Inaugural Gala ("banner acknowledgment").

Sponsors who donate $10,000 will receive ten Inaugural Gala tickets, six tickets to the Sponsors' Reception, verbal acknowledgement, copies of reception photographs, two tickets to the public swearing-in ceremony, and banner acknowledgment. Finally, the names of such sponsors will be listed by the Inaugural Nonprofit in the Inaugural Nonprofit's news releases identifying such sponsors as "title sponsors."

There are a number of events planned in connection with the inauguration of Mayor Elect Nutter. The Mayor-Elect/Mayor, his wife and daughter will be expected to participate in such events. It is possible, although not certain, that other City officials and employees will attend some or all of the events, and that some may be specifically asked to represent the administration at such events. Sponsors will have no say over invitations of, or attendance by, city officials. The Mayor-elect/Mayor will identify which city officials (if any) will attend the Inaugural Gala or the Sponsors' Reception on his behalf, without charge, as guests of the Inaugural Nonprofit.

The following events are currently planned in connection with the inauguration of Mayor Elect Nutter:

Event on January 3, 2008 (the week before the inauguration):

There will be a prayer service held at the Cathedral Basilica of Saints Peter and Paul. The event will be open to the pubic. There will be no charge for the event. We understand that tickets will not be issued for admission to the prayer service. The Inaugural Nonprofit is not funding this event.

Events on January 7, 2008 (the day of the inauguration):

1) There will be an inauguration ceremony, hosted by City Council. This event will be open to the public. We understand that the event will be paid for by City Council. There will be no charge for this event.

2) The Sponsors' Reception will be held some time after the Inauguration Ceremony. This event will be open to all sponsors who donate to the Nonprofit as described above. Any member of the public may attend by becoming a sponsor and making donations as described above. As noted in my prior letters, donations will not be accepted from political committees.

3) The Inaugural Gala will take place in the evening after the inauguration of Mayor-Elect Nutter. This event will be open to the public and tickets will cost $50 per person. The cost of the ticket will not cover the entire cost of the event. As discussed above, donations by sponsors will subsidize the cost of tickets for the Inaugural Gala.

Gift Issues Raised by the Ethics Board

On page 5 of Opinion 2007-005, the Ethics Board a series of questions regarding gifts, as follows:

> The principal gift questions include the following: whether the receipt of free food, drink and entertainment at any inaugural events by any City officials invited as guests of the organizers (presumably at least the new Mayor) would constitute a prohibited gift to those officials under various ethics laws; whether, even for any City officials who pay an admission charge that is less than the average cost of the event, the difference in value would constitute a prohibited gift to those officials; whether the offer of any such gifts would constitute a prohibited offer of gift by the nonprofit corporations; and whether, in such questions, even donors to the nonprofits could be considered to have offered or given such prohibited gifts.

Discussion of the Gift Issues.

We do not believe that any of the relevant ethics laws or rules limit the Mayor (and other City officers and employees) from being invited to and attending the inaugural events described above and receiving free food, drink and entertainment at those events.

We believe the principal legal issue is the application of Mayor's Executive Order No. 002-04.[2] We also reviewed Section 10-105 of the Philadelphia Home Rule Charter, the State Ethics Act, 65 Pa.C.S. § 1103(b), and Section 20-604 of the Philadelphia Code. We conclude that none of these prohibit the attendance by the Mayor and perhaps other City officials and employees at the inaugural events under the circumstances described in this letter. Only the applicability of Executive Order 002-04 is discussed in this letter. Please let me know if you wish us to provide a written analysis of the applicability of the other provisions to the facts presented here.

Section 1(1) of Executive Order No. 002-04 prohibits gifts, gratuities and favors in broad terms, as follows:

> No official or employee in the Executive and Administrative Branch shall solicit or accept, directly or indirectly, anything of value, including any gift, gratuity, favor, entertainment or loan, from any of the following sources
>
> (a) A person seeking to obtain business from, or who has financial relations with the City;
>
> (b) A person whose operations or activities are regulated or inspected by any City agency;
>
> (c) A person engaged, either as principal or attorney, in proceedings before any City agency or in court proceedings in which the City is an adverse party;
>
> (d) A person seeking legislative or administrative action by the City; or
>
> (e) A person whose interests may be substantially affected by the performance or nonperformance of the official's or employee's official duties.

The Inaugural Nonprofit, as a Pennsylvania nonprofit corporation formed in order to sponsor the inaugural celebration, is not a prohibited source under the Executive Order and does not fall into any of the categories in Section 1(1)(a) through (3) of Executive Order 002-04.

[2] We assume for purposes of this request, that an Executive Order continues in effect beyond the current Mayor's term of office.

As a nonprofit corporation formed for the purpose of providing support and coordination for the inaugural activities surrounding the inauguration of Mayor-Elect Nutter, and which has no employees or other operations, and whose existence will discontinue soon after the inauguration, the Inaugural Nonprofit is not: a person seeking to obtain business from, or who has financial relations with the City; a person whose operations or activities are regulated or inspected by any City agency; a person engaged, either as principal or attorney, in proceedings before any City agency or in court proceedings in which the City is an adverse party; a person seeking legislative or administrative action by the City; or a person whose interests may be substantially affected by the performance or nonperformance of the official's or employee's official duties.

Even if Section 1(1) of Executive Order 002-04 were construed to apply, Section 2 (Exceptions) would exempt attendance by the Mayor and/or other City officers and employees from its application. Section 2(c) expressly permits "[a]cceptance of food and refreshment at a public event or ceremony sponsored by a non-profit, community or civic organization, and attended by the employee or official in his/her official capacity." Executive Order 002-04 does not limit the exception to free public events or to public events at which the admission charge is limited to a certain amount. The Inaugural Nonprofit is a nonprofit corporation; the Inaugural Gala and the Sponsors' Reception are both events celebrating a major City event (the democratic transition to and the inauguration of a new mayor); and the various City officials and employees would be invited to attend in their official capacities. The exception thus would apply both to the Inaugural Gala and the Sponsors' Reception.

There is, however, an aspect of Executive Order No. 002-04 to be addressed. The Executive Order uses the words "directly or indirectly." We understand that an argument might be made that, even though the invitation will come from the Inaugural Nonprofit and the ticket, food, beverages and entertainment will be paid for solely from funds of the Inaugural Nonprofit, donors to the Inaugural Nonprofit (who might be considered prohibited sources under the Executive Order) "indirectly" will be making a gift to those officers and employees attending the event.

We do not think that this language in Executive Order No. 002-04 was intended or should be read, in the limited circumstances presented here, to prohibit the Mayor and other City officers and employees from attending the Inaugural Gala or the Sponsors' Reception as guests of the Inaugural Nonprofit. Donations will be made to the Inaugural Nonprofit for the purpose of sponsoring inaugural events and not for the purpose of making an indirect gift to the Mayor or other City officers or employees.

Requiring the Mayor to pay for tickets to his own Inaugural Gala or to personally donate to the inaugural events, or to attend the events in his official capacity but not eat

or drink, or not attend his own inaugural events at all, in our view, each would seem to be an absurd result that is not required by the language of Executive Order No. 002-04.

Gifts to the City Pursuant to Opinion No. 2004-02.

If the Ethics Board concludes that Executive Order No. 002-04 will apply to attendance by the Mayor and other City officers and employees at the Inaugural Gala and at the Sponsors' Reception, we suggest that the Ethics Board approve the use of the "gift to the City" procedure established by the Board in Opinion No. 2004 02. That Opinion interpreted Executive Order 002-04 and established a procedure by which City officials could appropriately authorize the attendance at certain sponsored events.

Under that procedure (as we propose it be implemented with respect to the Inaugural Gala and the Sponsors' Reception), the Inaugural Nonprofit would offer the appointing authority, here the Mayor, a certain number of tickets to attend the two events. The Mayor would make the decision as to which City officers and employees (including himself) are the logical persons to represent the City at the Inaugural Gala and the Donors' Reception and would be responsible for distributing tickets to those events to the individual City officers and employees designated by the Mayor to attend the events on behalf of the City.

As stated above, we do not believe that Executive Order 2004-02 applies in this situation. However, Mayor-Elect Nutter would have no objection to implementing such a "gift to the City" procedure, if the Ethics Board believes that implementation of such a procedure is required.

Thank you for your consideration of this request. Please contact me with any additional questions.

Sincerely yours,

Lawrence J. Beaser

LJB/lln
cc: Hon. Michael A. Nutter