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September 26, 2007

**Philadelphia Board of Ethics
Confidential Opinion No. 2007-003**

Re: Campaign Finance—Post-election payments to retire debt

The Board was asked for a confidential opinion regarding whether contributions to a candidate's campaign committee that are received after an election for the purpose of retiring campaign debt are regulated by the contribution limitations of Section 20-1002 of The Philadelphia Code. The Philadelphia Board of Ethics ("the Board") has authority to render advisory opinions on ethics matters, including campaign finance, as provided in Section 4-1100 of the Home Rule Charter and Sections 20-1006(3) and 20-1008 of the Philadelphia Code. We note that this question relates to an unsuccessful candidate in the primary election for City of Philadelphia elective office held on May 15, 2007. The Board of Elections certified the election results on June 4, 2007.

The Philadelphia Board of Ethics ("the Board") considered this confidential request in executive session at its meeting held on August 21, 2007 and approved a ruling that the Board interprets the ordinance to prohibit contributions that exceed the limits of Section 20-1002 that are received after an election to retire campaign debt incurred for use in advocating or influencing the election of the candidate. The requestor was so advised by telephone on August 23, 2007. The formal Confidential Opinion of the Board in this matter was issued on September 14, 2007. This nonconfidential version, edited to conceal the requestor's identity, will be made public.

Relevant Code Provisions

Section 20-1002 of The Philadelphia Code prohibits individuals from making "total contributions per calendar year. . . of more than two thousand five hundred dollars (\$2,500) to a candidate for City elective office" and prohibits all others (including businesses and political committees) from making "total contributions per calendar year of more than ten

thousand dollars (\$10,000) to a candidate for City elective office.” Phila. Code §§ 20-1002(1), (2). The Code also prohibits candidates and political committees from accepting contributions which exceed these contribution limits. Phila. Code § 20-1002(9).

A “candidate” is defined as someone who either “files nomination papers or petitions for,” or “publicly announces his or her candidacy for,” City elective office. Phila. Code § 20-1001(2).

A “contribution” is defined by the Code as “[m]oney, gifts, forgiveness of debts, loans, or things having a monetary value incurred or received by a candidate or his/her agent for use in advocating or influencing the election of the candidate.” Phila. Code § 1001(6).

Analysis

For purposes of applying the provisions of Chapter 20-1000, it is important to clearly define when an individual becomes a candidate. Accordingly, the Code’s definition of the term “candidate” defines the beginning point when an individual meets the definition. Once one becomes a candidate, however, there is not necessarily an “end point” when Chapter 20-1000 no longer applies, since actions taken after the election, that is, once the candidate was unsuccessful either in a primary or general election (or successful in a general election), may well be actions taken as a “candidate” for purposes of the provisions of the Code.

Moreover, a contribution made after an election could certainly be considered to have been made “for use in advocating or influencing the election of a candidate,” if the contribution was used, or intended to be used, to retire campaign debt. The fact that the efforts to advocate or influence the election of a candidate had already occurred before the time the contribution was made should be of no moment. If the purpose of the contribution was to retire campaign debt that was created by efforts to advocate an individual’s election, the Board concludes that such a contribution was intended to fund the advocacy of that person’s election. *See, e.g., United States v. Sun-Diamond Growers of California*, 941 F. Supp, 1277, 1280-81 (D.D.C. 1996) (deference given to Federal Election Commission determination, through regulations and prior advisory opinions, that funds raised after an election to retire campaign debts are received just as much for the purpose of influencing an election as are contributions received before the election).

Federal law is particularly helpful in addressing this issue because, like Chapter 20-1000, federal law specifically limits the amounts of contributions that may be made to candidates and, like Chapter 20-1000, federal law is not explicit about whether post-election fundraising by “candidates” is covered.

Federal law generally prohibits and limits campaign contributions “in connection with any” congressional election. 2 U.S.C. § 441b(a). Federal law defines a contribution in terms similar to that quoted above from the Philadelphia Code: “[a]ny gift, subscription, loan, advance or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office.” The Federal Election Commission (FEC), the

agency charged with enforcing federal campaign contribution restrictions, has long interpreted the federal statute to prohibit post-election fundraising in violation of the federal restrictions for the purpose of retiring campaign debt. *See Sun-Diamond Growers*, 941 F. Supp. 1277, 1280-81 (discussing regulatory history).

The federal courts have also approved of the logic of the FEC's interpretation: "If post-election contributions for the purpose of retiring campaign debts were not subject to [federal election law] limits, 'it would permit candidates to evade [federal election law] restrictions by running their campaigns at a deficit and then collecting contributions after the election.'" *Id.* at 1280 (*quoting FEC v. Lance*, 617 F.2d 365, 372 n. 4 (5th Cir. 1980), *cert. denied*, 453 U.S. 917 (1981)). Exempting post-election contributions from the statute "would provide an opportunity for the exception to swallow the rule." *United States v. Crop Growers Corp.*, 954 F.Supp. 335, 358 (D.D.C. 1997). Accordingly, there is a well-recognized policy-based reason for the Board's interpretation that the ordinance regulates post-election contributions.

Additionally, Pennsylvania law provides a definition of "contribution," for purposes of Pennsylvania's reporting rules and limited restrictions on campaign contributions, that includes post-election contributions to retire debt within its definition of the term "contribution." *See* 25 P.S. § 3241(b) ("contribution" includes payment of money for the purpose of influencing an election or "for paying debts incurred by or for a candidate or committee before or after any election").

An argument might be made that, because the City ordinance in some respects uses definitions for certain terms that are similar to, or the same as, those contained in state law (for example, the City and state definitions of the term "expenditure" are similar), the City's use of a definition of the term "contribution" that is not as explicit as the Pennsylvania definition with respect to post-election contributions is somehow indicative of an intent to *exclude* post-election payments from the definition. The Philadelphia definition of the term "contribution" is, however, on the whole, far closer to the federal definition of the term than to the Pennsylvania definition. Moreover, as has been already noted, the Philadelphia contribution rules are far more similar in substance to the federal rules than they are to Pennsylvania law. Accordingly, the Board concludes that the better analysis is that City Council's use of language similar to that used in federal law suggests an intent that the ordinance be interpreted similarly to federal law.

The federal courts that have addressed this issue have relied significantly on the principle, first established in *Chevron, USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), that, absent clear congressional guidance, courts should defer to the legislative interpretation of expert administrative bodies charged with the enforcement of complex legislative schemes. *Sun-Diamond Growers*, 941 F. Supp. at 1280-81. Pennsylvania law similarly provides that when a statute does not explicitly address an issue, "an administrative agency's interpretation of a statute for which it has enforcement responsibility is entitled to substantial deference." *Borough of Pottstown v. Pa. Mun.*

Retirement Bd., 712 A.2d 741, 744 (Pa. 1998)¹. The Board interprets Ch. 20-1000 to apply to post-election contributions to retire debts incurred prior to certification of the election.

The important policy behind this determination is that it would defeat the purpose of Chapter 20-1000 if candidates could evade the campaign finance restrictions by the stratagem of deferring payment of expenses until after the election. To quote more fully from the federal court's opinion in *Sun-Diamond Growers*, the Board finds the following discussion persuasive:

[T]he FEC [Federal Election Commission] has issued several opinions which clearly set forth its position that the FECA [Federal Election Campaign Act] requirements apply to post-election contributions. "The Commission in both its regulations and prior advisory opinions has emphasized that funds raised after an election to retire election campaign debts are just as much for the purpose of influencing an election and in connection with the election as are those contributions received before the election." *Advisory Opinion 1983-2, 1 Fed.Elec.Camp.Fin.Guide [CCH] P 5709 (February 24, 1983)*. In another opinion, the FEC concluded that "monies received to defray the cost of post-election litigation which arises out of the election are treated the same as monies received to defray the cost of litigation during the election." *Advisory Opinion 1981-16, 1 Fed.Elec.Camp.Fin.Guide [CCH] P 5604 (April 15, 1981)*.

If post-election contributions for the purpose of retiring campaign debts were not subject to FECA's limits, "it would permit candidates to evade FECA's restrictions on contributions and expenditures by running their campaigns at a deficit and then collecting contributions after the election." *FEC v. Lance*, 617 F.2d 365, 372 n. 4 (5th Cir. 1980), cert. denied, 453 U.S. 917 (1981). Thus, contrary to Sun-Diamond's argument, post-election contributors could seek to secure a political *quid pro quo* from potential office holders by making post-election contributions.

Sun-Diamond Growers, 941 F. Supp, at 1280 (footnote omitted).

¹ Although some of the caselaw on this point concerns instances where the administrative agency has formally promulgated regulations interpreting the agency's governing statute, several recent court opinions make it clear that the *Borough of Pottstown* principle applies as well to situations where the agency makes an interpretation through a ruling or opinion. See, e.g., *In re: Nomination Petition of Timothy J. Carroll*, 586 Pa. 624, 649, 896 A.2d 566, 581 (Baer, J., dissenting)(2006)(quoting the same sentence from *Pottstown*); *Malt Beverages Distributors Ass'n v. Penna. Liquor Control Bd.*, 918 A.2d 171, 176 (Pa. Commw. 2007) (quoting same sentence); *City of Philadelphia v. FOP Lodge No. 5*, 916 A.2d 1210, 1216-1217 (Pa. Commw. 2007) (courts accord "substantial weight" to an agency's interpretation of its governing statute);

To reiterate, the Board interprets Chapter 20-1000 of the Philadelphia Code to prohibit contributions that exceed the limits of Section 20-1002 and that are received after an election to retire campaign debt that was incurred for use in advocating or influencing the election of the candidate.

By the Board:

Richard Glazer, Esq., Chair
Richard Negrin, Esq., Vice-Chair
Stella M. Tsai, Esq., Member
Phoebe A. Haddon, Esq., Member

Issued September 14, 2007. Pauline Abernathy participated in the discussion and vote on the initial determination on August 21, 2007, but did not participate in the drafting or approval of the Confidential Opinion.