Board of Ethics Hearing on Regulation 4

The Philadelphia Board of Ethics announces that it will conduct a public hearing concerning Regulation No. 4, entitled "Seeking Advice From The Board of Ethics." The hearing will begin at **10:00 a.m. on May 30, 2008**, and will be conducted at the Offices of the Board of Ethics, 1441 Sansom Street, 2nd Floor, Philadelphia, PA 19102. This hearing is open to the public. The text of the Regulation follows.

CITY OF PHILADELPHIA

BOARD OF ETHICS
PACKARD BUILDING
1441 Sansom Street
2nd Floor
Philadelphia, PA 19102-3026
(215) 686 – 9450
FAX 686 – 9453

Evan Meyer
General Counsel

Notice

At its regular, advertised monthly meeting on April 16, 2008, the Board of Ethics approved its fourth regulation, Regulation No. 4 ("Seeking Advice from the Board of Ethics"), providing guidance on who may request and receive advice from the Board, in what form, on what subjects, and under what conditions and with what effects. The proposed regulation follows this cover notice.

This regulation is not yet in effect.

It must be emphasized that, as required by Section 8-407 of the Philadelphia Home Rule Charter, this regulation will not become effective until after being on file for public inspection for 30 days in the Department of Records, with the opportunity of any person affected to request a hearing. The Law Department has already approved the regulation as legal and in proper form. The Board of Ethics has announced that it intends to hold a public hearing on the regulation after the 30-day public inspection period. The date and place of the hearing will be advertised and posted on this web site. The regulation will then become effective on the tenth day after the hearing has been held and a report of the hearing filed.

Evan Meyer
General Counsel

PHILADELPHIA BOARD OF ETHICS

REGULATION NO. 4
SEEKING ADVICE FROM THE BOARD OF ETHICS

WHEREAS, as provided in Section 4-1100 of the Home Rule Charter, the Philadelphia Board of Ethics ("the Board") is empowered to administer and enforce all provisions of the Home Rule Charter and City ordinances pertaining to ethical matters, which matters shall include "conflicts of law, financial disclosure, standards of governmental conduct, campaign finance matters, prohibited political activity," and such other matters as may be assigned by Council; and

WHEREAS, the Board has the power to administer and enforce the laws pertaining to ethical matters, handle all inquiries and complaints and specifically to render advisory opinions, as provided in Section 4-1100 of the Philadelphia Home Rule Charter and Section 20-606(1) of The Philadelphia Code; and

WHEREAS, the Board is further authorized by Section 20-606(1) of The Philadelphia Code to develop procedures to provide informal guidance concerning the ethics laws; and

WHEREAS, the Board is empowered by Sections 4-1100 and 8-407 of the Home Rule Charter and Section 20-606(1) of The Philadelphia Code to make all necessary regulations to carry into effect its responsibilities;

NOW THEREFORE, the Board of Ethics hereby adopts this Regulation No. 4 to establish procedures for seeking advice from the Board.

4.1 General Provisions

(a) **Definitions:**

"Advisory opinion" or "Advice." The Board interprets the phrase "advisory opinion," as used in Section 4-1100 of the Charter and in Section 20-606(1)(d) of The Philadelphia Code, and the term "advice," as used throughout this regulation, to mean a definitive written ruling of the Board or its staff on specific facts provided in a request made to the Board, under this regulation, for advice as to how the laws pertaining to ethical matters apply to the conduct of a particular person or persons. Informal General Guidance, as discussed in paragraph 4.7 below, shall not be considered to be "advice" or an "advisory opinion." The term "advisory opinion" shall include both Advices of Counsel under

Paragraph 4.5 of this regulation and Formal Opinions under Paragraph 4.6 of this regulation.

"The Board" shall mean the body of members of Board of Ethics appointed pursuant to Section 3-806 of the Home Rule Charter.

"The Board or its staff" shall mean the Board itself, or the General Counsel, the Executive Director, or any of their designees, as described in this regulation.

"Candidate," "candidate political committee," and "political committee" shall have the same meaning as set forth at Section 20-1001 of The Philadelphia Code.

"General Counsel" shall mean the General Counsel of the Board, or his or her designee.

"Officer or employee" shall have the same meaning as set forth at Section 20-601(2) of The Philadelphia Code.

(b) **Permissible subjects of requests.** In accordance with Section 4-1100 of the Home Rule Charter, the Board or its staff, as provided below, shall provide advice concerning provisions of the Home Rule Charter and City ordinances pertaining to ethical matters, which matters shall include conflicts of interest, financial disclosure, standards of governmental conduct, campaign finance matters, prohibited political activity, disclosures required by Code Ch. 17-1400, and such other matters as may be assigned by Council.

(c) **Who may request advice.** Except as provided in paragraph 4.1(c)(1) below, advice or informal general guidance, which may be of any of the types discussed in paragraphs 4.5, 4.6, and 4.7 below, shall be rendered by the Board or its staff on the request of a City officer or employee, or upon the request of a candidate, candidate political committee, or political committee, and shall apply only to the requesting City officer or employee, candidate, candidate political committee, or political committee.

(1) **Requests about subordinates.** In addition to the above paragraph, advice or informal general guidance, which may be of any of the types discussed in paragraphs 4.5, 4.6, and 4.7 below, shall also be rendered by the Board or its staff on the request of a supervisor or appointing authority of a subject City officer or employee, concerning the conduct of that subject officer or employee.

(2) **Requests from representatives.** The Board generally expects that City officials and employees seeking advice concerning their own conduct will personally request such advice. However, the Board will receive requests from authorized representatives of requestors, such as deputies, attorneys and similarly situated individuals, but not from secretaries and other support staff without independent authority.

(d) **Advice on future conduct only.** Except as provided in paragraph (e) below, the Board or its staff shall only issue advice to a City officer or employee or a supervisor of such City officer or employee, or to a candidate, candidate political committee, or political committee with respect to the proposed future conduct or action of the subject whose conduct is at issue.

(e) In a Formal Opinion or Advice of Counsel, the Board or its General Counsel may, in their discretion, determine that it is necessary to address past conduct in the context of providing advice as to corrective action or future action that represents part of a continuing course of conduct that began prior to the request, and where the Board or its General Counsel concludes, based on the facts of the particular matter, that part of the advice as to future conduct necessarily involves providing a conclusion as to whether past conduct was in compliance with the ethics laws. The decision to address past conduct in a Formal Opinion or Advice of Counsel may include advice requiring remedial action going forward, shall not provide protection from penalties or sanctions under the ethics laws, as set forth in paragraph 4.1(f) below, and shall in no way preclude the Board from initiating an investigation or pursuing an enforcement action concerning the past conduct.

(f) **Reliance.** A City officer or employee, candidate, candidate political committee, or political committee whose conduct or action is the subject of either a Formal Opinion issued by the Board or an Advice of Counsel issued by the General Counsel shall not be subject to penalties or sanctions under the ethics laws administered by the Board by virtue of reasonable reliance on such advice, unless material facts were omitted or misstated in the request for the formal advice. Advice on statutes and other rules over which the Board has not been given jurisdiction by the Charter or The Philadelphia Code, including the State Ethics Act, will not be binding on any person and will not provide the protection from sanctions described in the preceding sentence of this paragraph.

In particular, the State Ethics Commission is the ultimate arbiter of interpretations of the State Ethics Act. 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, requestors have the option to obtain an opinion from the Law Department as to the application of the State Ethics Act. Should the Board give advice concerning the State Ethics Act, this option will be noted, along with a caution that a written, nonconfidential opinion of a solicitor 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, the Board may conclude that in matters where the law is unsettled, the requestor will be advised to seek advice directly from the State Ethics Commission.

4.2 Communication with the Board or its staff, in general.

As provided in Paragraph 4.1(a) above, an "advice" is a definitive written ruling of the Board or its staff on specific facts provided in a request made to the Board, under this regulation, for "advice" as to how the ethics laws apply to the conduct of a particular person or person(s). After the effective date of this regulation, any communication with the Board by another person (as "person" is defined in Code Section 20-601(12)) shall not be considered to be a request for "advice" unless the communication clearly states that it is a request for "advice", and otherwise complies with the requirements of paragraph 4.4.

Requests for informal general guidance, copies of Board publications, correspondence on investigations or other matters not involving a specific request for advice concerning the conduct of a person not subject to the Board's jurisdiction, or requests to provide a nonbinding preliminary review of draft documents shall not be considered to be requests for "advice". Additionally, a request for a preliminary informal review of a hypothetical or proposed request or situation will not be considered a request for "advice," and the Board or its staff may decline to respond to such informal reviews in advance of, or in lieu of, a request for "advice".

Any response provided by the Board or its staff, via e-mail, or in writing—unless specifically labeled "Formal Opinion" or "Advice of Counsel"—is not "advice" as that term is used in Charter Section 4-1100 or Code Section 20-606, and is therefore not advice upon which the requestor may rely. The Board has determined that neither it nor its staff will provide "advice" orally (including in person, in meetings, or on the telephone). Thus, any oral communication will not be advice upon which the requestor, or any other person, can rely for any purpose, including as protection from penalties or sanctions that may be imposed by the Board under Charter Section 4-1100 or Code Section 20-612, for violations of the ethics laws.

4.3 Public and non-public advice

Section 20-606(1)(d)(iii) of The Philadelphia Code provides as follows, relating to advisory opinions issued by the Board of Ethics:

> The Board shall make public its advisory opinions with such deletions as may be necessary to prevent disclosure of the identity of any City officer or employee or other involved party in accordance with regulations promulgated by the Board.

The Board interprets its responsibility to provide "advisory opinions" and to make them public to permit the Board to issue rulings (either a Formal Opinion or an Advice of Counsel) under the following conditions. At the time a requestor submits a request for advice, he or she must specify whether or not the requestor seeks a Formal Opinion or Advice of Counsel that preserves the anonymity of the requestor or subject of the advice. If the requestor requests anonymity, the Board or General Counsel shall issue a Nonpublic Formal Opinion or a Nonpublic Advice of Counsel, addressed to the requestor by name and including all necessary identifying information. That version of the document, with identifying information, will not be made public and will be provided only to the requestor. However, consistent with the Code provision cited above, a "redacted version," of the document, edited to conceal the name, specific City position, and other identifying information about the requestor or subject of the advice, shall be made public.

4.4 Request for Advice

(a) A request for advice shall be submitted in writing or faxed or e-mailed, and shall be signed by the person seeking the advice. An e-mail may be considered to be "signed" if it otherwise complies with the requirements of Paragraph 4.4(b) below and is sent by a person from whom the Board will accept requests under Paragraph 4.1(c) above. The request shall be considered complete and appropriate for Board action after it has been reviewed by the General Counsel, or his or her designee, and all necessary information has been received.

(b) Except as provided in (c) below, the request for advice shall include the following information:

(1) The name, address, and telephone number of the person who is the subject of the request;

(2) If the request is being made by a supervisor of a City officer or employee or by a representative on behalf of a requesting party, the name, address and telephone number of the supervisor or representative shall be supplied;

(3) The name of the governmental body with which or for whom the subject serves and the name or title of the person's public office or position;

(4) The nature and duties of the subject's office or job, a specific description of the conduct contemplated by the subject, and a specific statement of the question sought to be answered by the Board; and

5) A list of all relevant facts and circumstances surrounding the request.

(c) A request concerning a candidate, candidate political committee, or political committee shall include the following information:

(1) The name, address, and telephone number of the person who is making the request, and that person's relationship to any entity in (2) below;

(2) The name, address, and telephone number of any candidate, candidate political committee, or political committee that is the subject of the request, as well as the name, address, and telephone number of the treasurer of any such candidate political committee or political committee.

(3) If the request is being made by an attorney or treasurer on behalf of a requesting party, the name, address and telephone number of the representative shall be supplied;

(4) A specific description of the conduct contemplated by the subject and a specific statement of the question to be answered; and

5) A list of all relevant facts and circumstances surrounding the request.

(d) The requestor shall notify the Board, in writing, as to whether he or she is requesting an "advisory opinion" as defined in paragraph 4.1(a) or is seeking informal general guidance.

(e) Upon notification that the requestor is seeking formal advice from the Board, the General Counsel, or his or her designee, shall determine whether a Formal Opinion will be issued or whether the request will be answered as an Advice of Counsel.

4.5 Advice of Counsel

(a) An Advice of Counsel may be issued, and made public, if it is determined by the General Counsel that authority exists to issue a response without Board approval. Authority to issue an Advice of Counsel shall be based on one or more of the following when they are directly applicable to the question presented:

(1) Prior advisory opinions of the Board or City Solicitor;

(2) Specific provisions of the Home Rule Charter or The Philadelphia Code; or

(3) Court opinions interpreting the Home Rule Charter or The Philadelphia Code.

4.6 Formal Opinion

(a) If the General Counsel determines that an Advice of Counsel cannot or should not be issued, the General Counsel shall refer the matter to the Board, with a recommendation.

(b) A Formal Opinion shall be issued and made public after it has been approved by a majority of the members of the Board.

(c) The Board may amend a previously issued Formal Opinion or Advice of Counsel after giving reasonable notice to the affected City officer or employee, candidate, candidate political committee, or political committee that it is reconsidering its opinion or advice. An amended Formal Opinion or advice shall apply only to future conduct or action of the City officer or employee, candidate, candidate political committee, or political committee.

4.7 Informal General Guidance

The Board or its staff may provide, either upon request or on its own initiative, informal general guidance as a way to educate and inform the officers and employees of the City and others. Such general guidance may be provided in the form of trainings, meetings, newsletters, advisory notices, telephone calls, e-mails, memoranda, or correspondence. Any such informal general guidance shall not be captioned "Formal Opinion" or "Advice of Counsel;" will not be a definitive written ruling of the Board or its staff on specific facts; and may not be relied upon by any person as protection against any enforcement action under the ethics laws. Informal general guidance may not be requested to be edited to preserve anonymity. Such guidance will not normally be made public by the Board, but may be subject to disclosure upon request, under the Pennsylvania Right to Know Law.

Approved by the Board of Ethics, April 16, 2008