



## CITY OF PHILADELPHIA

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### **Philadelphia Board of Ethics Non-Public Board Opinion No. 2020-002**

March 5, 2020

**Re: Application of the City’s political activity restrictions to sale of a product used by campaigns for elective office**

Dear Requestor,

You have requested a non-public advisory opinion about whether the City’s ethics rules would permit you to sell a product used by campaigns for elective office (the “product”), either one-time or subscription-based, yourself or through an agent, to political campaigns or consultants who are hired by political campaigns. You also asked whether, if you are limited to selling through an agent, you can hold a stake in the company that arranges the sale.

As discussed below, the political activity rules would prohibit you, whether directly or through an agent, from marketing or selling<sup>1</sup> your product to political campaigns or political consultants working for campaigns. A one-time divestment sale, however, may be permissible in certain circumstances. You may also be able to retain a financial interest in a business that continues to market and sell the product if you are effectively insulated from business decisions and operations. Any potential sale of the product would create a conflict of interest that may require disclosure and disqualification.

#### **I. Jurisdiction**

Philadelphia Home Rule Charter Section 4-1100 grants the Board of Ethics jurisdiction to administer and enforce all Charter provisions and ordinances pertaining to ethical matters. Charter Section 4-1100 and Philadelphia Code Section 20-606 authorize the Board to render advisory opinions explaining the application of laws under the Board’s jurisdiction concerning a City officer or employee’s proposed future conduct. Board Regulation No. 4 describes the procedures related to seeking an advisory opinion and for requesting reconsideration of an advisory opinion issued by the Board.

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<sup>1</sup> Unless otherwise specified, as used in this Opinion the terms “sale” or “sell” are intended to include any arrangement or mode of disposition, regardless of form or terms, that seeks to monetize or commercialize the product or related services, including sales or licensing agreements, executory contracts, and service contracts.

## **II. Facts**

You are a recently hired City employee. Prior to joining the City, you had your own business. You wound down your business activity prior to starting your City job. As part of your business, you developed a product that is used by campaigns for elective office. You sold the product to political campaigns and political consultants.

## **III. Relevant Law**

The nature of the product means that the most likely buyers would be candidates, campaigns, and political consultants working for campaigns. As a result, your ability to sell the product is restricted by the political activity rules found in Section 10-107 of the Home Rule Charter and Board Regulation 8. Charter Section 10-107(4) restricts political activity by City employees. Board Regulation No. 8 defines “political activity” as any activity directed toward the success or failure of a political party, candidate, or partisan political group. Board Reg. 8, ¶ 8.1(m). Among other things, City employees cannot take any part in a political campaign. *Id.* at ¶ 8.7(b).

In addition, Section 20-607 of the Ethics Code prohibits a City officer from taking official action when either (a) they have a personal financial interest in that action or (b) a business or other entity of which they are a member has a financial interest in that action. If an employee has a conflict and can take official action that would financially impact the source of that conflict, the employee must disclose the conflict and disqualify themselves from any such official action. City Code §20-608. A “financial interest” is “an interest involving money or its equivalent or an interest involving any right, power or privilege that has economic value.” Code §20-601(9). A person or entity has a financial interest in matters that have a potential impact on the person’s or entity’s income, compensation, assets, wealth, employment prospects, or business prospects. *See* Board Ops. 2019-002; 2012-001.

## **IV. Discussion**

The Board has not directly addressed the application of the City’s political activity restrictions to a City officer or employee who wants to market or sell a product or service to candidates, political campaigns, or political consultants. As discussed below, the Charter’s political activity restrictions prohibit you from marketing or selling your product, either directly or through a sales agent, to a political campaign, party, candidate, or consultant. A one-time divestment sale, or the retention of a purely financial interest in a business that sells and markets the product, however, may be permissible under certain conditions. Also, if you seek to sell the product, you have a conflict of interest that may need to be addressed through disclosure and disqualification.

**A. Sales to political campaigns or political consultants prohibited whether direct or through a sales agent**

From what you described, the product is designed to provide insights and analysis to assist campaigns in selecting and implementing political strategies. As a result, directly marketing or selling your product to political campaigns would be taking part in a political campaign. The result would be no different if you used a sales agent to market and sell the product. Therefore, Charter Section 10-107(4) prohibits you from marketing or selling your product to political campaigns, political parties, or candidates for elective office, as well as to consultants working for any such buyers other than in the limited circumstances described below.<sup>2</sup>

Marketing or sales to political consultants who work for political campaigns would also be prohibited by Section 10-107(4). A political consultant would be purchasing the product for use by or on behalf of their client(s) to carry out the management of a political campaign. Selling the product to a consultant under such circumstances would be indistinguishable from selling directly to a political campaign.

In contrast, you could sell the product to a non-partisan group or government entity (other than the City, *see* Charter Section 10-102) so long as the buyer is not coordinating with a political party, campaign, or candidate.

**B. One-time divestment sale permitted in limited circumstances**

While you cannot market or sell the product as an ongoing concern, you would be able to make a one-time divestment sale of the product so long as (1) the product can be sold as a finished product with minimal preparation; (2) you do not provide any ongoing maintenance or other services to the buyer; and (3) you relinquish all future rights to the product. You would still be prohibited, however, from marketing the product, either directly or through an agent, to buyers who are candidates, political campaigns, or political consultants. You must also comply with the City's conflict of interest rule as discussed below.

**C. Financial interest in business permitted in limited circumstances**

You also asked whether you would be permitted to retain an interest in a business that would continue to market and sell the product. You may retain such an interest only if it is purely financial. You could not have any managerial or other authority over or role in the business or the product. You could not be involved in maintaining or customizing elements of the product, marketing or selling the product, or making decisions about the operations of the business entity. This would require more than simply hiring a sales agent – you would need to be sufficiently walled off from the operations of the business such that it could effectively function as a blind trust.

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<sup>2</sup> While your product is geared towards campaigns in and around Pennsylvania, the restrictions of Charter Section 10-107(4) apply regardless of where the candidate, campaign, party, or consultant is located.

**D. Conflicts of Interest**

Apart from the political activity rules, the conflict of interest rule prohibits you from taking official action that would provide you a financial benefit. While there are a variety of possible scenarios that could require disclosure and disqualification, the most likely to arise in your situation is a potential sale to an entity or individual that interacts with the City Department you work for. In such situations, you would need to disclose the conflict and disqualify yourself from any action that would impact the prospective buyer.

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Thank you for your concern about compliance with the City’s Ethics Code and for seeking advice. Advisory opinions are fact-specific, and this Opinion is predicated on the facts you have provided. Requestors of advisory opinions are entitled to act in reasonable reliance on opinions issued to them and not be subject to penalties under the laws within the Board’s jurisdiction, unless they have omitted or misstated material facts in their requests. Code § 20-606(1)(d)(ii); Board Reg. 4 ¶ 4.12.

Since you requested a non-public opinion, the original Opinion will not be made public. As required by the City Code, a version of the Opinion that has been redacted to conceal facts that are reasonably likely to identify you is being made public. Please let Board Staff know if you have any questions.

BY THE PHILADELPHIA BOARD OF ETHICS

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