



CITY OF PHILADELPHIA

BOARD OF ETHICS
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**Philadelphia Board of Ethics
Non-Public General Counsel Opinion No. 2014-506**

November 7, 2014

Re: Outside Employment as Independent Contractor Sales Consultant

Dear City Official:

You have requested a non-public advisory opinion about the application of the City ethics laws to your proposed outside employment as an independent contractor sales consultant with a local technology company. The City ethics laws do not prohibit you from accepting this position outside City government, but as a City official you must abide by City ethics laws while engaged in outside work. The City ethics laws most directly applicable to outside employment are restrictions on conflicts of interest, interests in certain City contracts, and representation of others in transactions involving the City.

I. Facts Provided

You provided the facts stated here. You are a City official who is considering accepting a sales consulting position with a local technology company (the “Company”). You were recently approached by Person A, an officer and partner of the Company, and asked whether you would be interested in acting as a sales consultant for the Company. As a sales consultant, you would be involved in trying to acquire clients for the Company. You would act as an independent contractor for the Company, which would compensate you on a commission basis.

You have not interacted or dealt with Person A or with the Company in your role as a City official. You were introduced to Person A a few years ago, and to your knowledge Person A does not have any matters or interests before your City agency.

You do not have prior experience or expertise in sales or technology. You believe you have been asked to be a sales consultant for the Company because of the people you

know. The Company would like you to approach people you know and tell them about one of the Company's products.

As a sales consultant for the Company, you would approach people you have come to know over the years since you were in your early twenties. You would approach people who do not have current matters before your City agency. For example, you would consider approaching an executive with whom you had contact prior to your work with the City. Your name would not appear in any Company literature, nor would you be identified on any Company stationery or elsewhere as an employee. You would not identify yourself as a City official to any clients or prospective clients of the Company, and you would not use your City position to garner any business for the Company. The Company does not do any business with the City, and you would not recommend the Company's technology to the City. Most of the Company's clients are banks, insurance companies, and other private companies with whom you have not dealt in your role as a City official.

Person A described to you the sequence of your expected role in the Company's sales process as follows:

1. You and the Company will mutually develop a list of targets for you to approach.
2. You contact the targets and tell them about a new technology product that you believe can be very beneficial for their organization and tell them you would like to get a 15-20 minute call with the principals of the Company and their organization.
3. You forward them the introductory email pitch that an employee of the Company has sent you and copy that employee so he/she can do the follow-up of setting up a meeting.
4. The Company speaks with your contact and/or the appropriate technical staff to explain exactly how the Company's service works and how it can benefit them.
5. The Company endeavors to get a proof of concept project going with the target organization to show that the Company's service is capable of doing exactly what the Company claims it can do.
6. The Company explores larger projects that the target organization would like to have the Company undertake.

Person A has explained that the only critical function required of you would be to get the Company an introductory meeting or call. If there are difficulties getting the initial meeting set up, or follow-up is taking longer than expected after the initial introduction, then they would ask you to re-engage with your contact to keep the process on course on a case-by-case basis.

Person A mentioned to you that if you introduce the Company to other people who can make introductions to prospective clients the Company will pay you an override on business the other people help the Company capture. In that instance, you would be able to generate income from contacts that you do not know but that other people bring to the Company.

You have stated that you will not accept any employment offer from the Company until you receive the Board's guidance on this issue. You have also requested an opinion from the State Ethics Commission.

II. Jurisdiction

The Board of Ethics has jurisdiction to administer and enforce all Philadelphia Home Rule Charter ("Charter") provisions and ordinances pertaining to ethical matters. Charter §4-1100. The Charter and the Philadelphia Code ("Code") authorize the Board to render advisory opinions concerning a City officer's or employee's proposed future conduct. Charter §4-1100; Code §20-606(1)(d). Board of Ethics Regulation 4 describes the procedures related to seeking an advisory opinion and for requesting reconsideration of a General Counsel opinion. Board Regulation 4, ¶¶ 4.0, 4.24.

III. Discussion

City ethics laws do not prohibit City officers and employees from maintaining employment and other financial interests outside City government, provided that outside work is not performed using City facilities or resources (including equipment, materials, and staff time), and outside employment, sources of income, and financial interests are disclosed as required on annual financial disclosure statements.¹ Board Opinion 2012-001 at 1; *see also* Code §20-610 (City statement of financial interest requirements). Officers and employees who maintain outside employment and other financial interests must avoid conflicts of interest and must abide by the other City ethics restrictions described below. Board Opinion 2012-001 at 1.

A. Conflicts of Interest

The Code conflict of interest restriction prohibits a City official from taking action in an official capacity when either (a) he or she has a personal financial interest in that action; or (b) a business of which the official is a member, or a fellow member of such business, has a financial interest in the official's action. *See* Code §20-607(a)-(b); Board Opinion 2012-001 at 5. The Board has advised that a person or entity has a financial interest in matters that have a potential impact on the person or entity's income,

¹ The Code requires you to file an annual financial disclosure form that is due May 1 each year. Code §20-610(1).

compensation, value of assets, wealth, employment prospects, or business prospects. Board Opinion 2012-001 at 5. The Board has opined that a financial interest may also arise from an on-going, present financial relationship and that it is possible for a financial interest to be too remote in some cases to give rise to a conflict of interest. *Id.*; *see also* Board Opinion 2009-003 at 4-5 (discussing Solicitors' opinions advising City Council members that a conflict of interest does not arise if a personal financial interest in a Council bill is not direct, immediate and particular, as distinct from the interests that might be shared by a larger group).

Your proposed work as a sales consultant appears to avoid an intersection between your City duties and your personal financial interests, the financial interests of the Company, and the financial interests of your sales targets/clients. Key facts you have provided that indicate this is the case and that you will avoid conflicts of interest with respect to this outside position include: (1) your lack of interaction as a City official with the Company, with Person A, and with the sales targets you say you will approach; (2) your plan not to identify yourself as a City official to any Company clients or prospective clients and not to otherwise use your City position to gain business for the Company; and (3) the Company's lack of business with the City as well as Person A's and prospective sales targets' lack of business before your City agency.

If you accept the proposed sales consultant arrangement with the Company and do find yourself in a position to take action as a City official in a matter that would affect your compensation from the Company or its ability to employ you, or would affect the financial interests of your sales targets/clients, you would have a conflict of interest. *See* Board Opinion 2012-001 at 5-6 (applying conflict of interest provisions to a City official's outside employment as an independent contractor). When you have a conflict of interest, you must publicly disclose the nature and extent of your financial interest in the matter giving rise to the conflict and disqualify yourself from all further action on the matter. Code §§20-607(a)-(b), 20-608(1); *see also* Board Opinion 2012-001 at 5-6. Code Section 20-608 sets out detailed procedures for disclosure and disqualification. The procedure that is required varies based on whether the conflict is related to legislation or another type of matter. Code §20-608. Participation that you must avoid when you have a conflict with respect to a matter not only includes final decisions, but also preliminary discussion, review, or action. Board Opinion 2012-001 at 6.

The conflict of interest restriction also extends to situations when a financial interest resides in a member of a for-profit business of which you are a member. Code §20-607(b). The Board has previously advised that independent contractors are not "members" of the firms for which they work. Board Opinion 2012-001 at 6. Because you would be engaged as an independent contractor for the Company, you would not be considered a member of the Company. It follows that if you are in a position to take action in your official capacity on a matter in which a member of the Company has a financial interest, this restriction would not apply to you, and you would not be required

to publicly disclose and disqualify yourself from further action. *See id.* Although this restriction does not apply to you as an independent contractor, you may wish to be sensitive to possible public perception that you have similar interests to those of a member of the Company that could influence you when matters involving a member of the Company come before you as a City official. If that appearance is of concern to you, you can take steps to avoid it by disqualifying yourself from action on a particular matter even though the law does not require it.

B. Prohibited Interests in Certain City Contracts

All City officers and employees are prohibited under the Home Rule Charter from soliciting, benefitting from, or being directly or indirectly interested in certain City contracts that are paid for by City Treasury funds. Charter §§10-100, 10-102. The Home Rule Charter prohibits you from soliciting or having an interest in City contracts for the purchase of property of any kind, for the erection of any structure, or for the supplying of any services regardless of whether a connection exists between your official duties and the contracts. *See* Board Opinion 2014-001 at 2 (analyzing Charter restriction on interests in certain City contracts for City officers and employees). The relevant Charter annotation describes the broad purpose of this prohibition on an interest in certain City contracts: “Ethical standards of conduct preclude one who is a City officer from soliciting in a private capacity or personally profiting or being interested, directly or indirectly, in contracts with the City whose officer he is.” Charter §10-100, ann.

Your proposed engagement with the Company as a sales consultant does not raise an issue under the Charter restriction on interests in certain City contracts because the Company does not do any business with the City (therefore it does not have contracts with the City) and you have said that as a sales consultant you would not recommend the Company’s technology to the City. An issue would arise under the Charter restriction on interests in certain City contracts if you were to take steps to pursue a contract with the City for the purchase of property (such as a contract for the City to buy the Company’s technology) or a contract for the supplying of services (such as a contract for the Company to act as a technology consultant to the City). If the Company does enter into a contract with the City for the purchase of property, supplying of services, or the erection of a structure, no part of your compensation may be derived from revenue that the Company receives from the City under that contract. *See* Board Opinion 2012-001 at 2 (advising that Charter restriction on interests in certain City contracts prohibits City official’s compensation as an independent contractor to be derived from firm revenue received under certain City contracts). In addition, you may not otherwise benefit from such a contract. For example, an issue would arise if the Company pays you an override or commission when someone you introduce to the Company helps the Company acquire a technology purchase contract paid out of City funds.

C. Representation Restriction

The Code representation restriction prohibits you from assisting another person by representing the person directly or indirectly as agent or attorney in a transaction involving the City, whether or not your City agency is acting in the matter.² *See* Code §20-602(1)(a); Board Opinion 2012-001 at 2-3. Based on the information you have provided, your proposed work for the Company does not raise an issue under this representation restriction. This is because your work as a sales consultant would not require you to represent anyone before the City or to represent the Company or any client as an agent in a transaction involving the City.

The representation restriction also provides that no member or employee of a business entity organized for profit of which you are a member shall represent any person directly or indirectly as agent or attorney in any matter in which you as a City official are responsible for the decision, approval, or otherwise determining the matter, unless you publicly disclose the fact and disqualify yourself from responsibility in the matter. Code §20-602(5). As described above, your status as an independent contractor with respect to this sales consulting position means you would not be considered a member of the Company. *See* Board Opinion 2012-001 at 4 (concluding that independent contractors are not “members” of the firms for which they work for purposes of the representation restriction). Consequently, if a member or employee of the Company represents the Company or a client before your City agency, this provision of the representation restriction found at Code Section 20-602(5) would not apply, and you would not be required to disqualify yourself from taking action and make a public disclosure. You may wish to be concerned about public perception and take steps beyond what is legally required to disqualify yourself.

D. Confidential Information

The Code prohibits you from directly or indirectly disclosing or making available confidential information concerning the property, government, or affairs of the City without proper legal authorization for the purpose of advancing your own financial interest or that of another person. Code §20-609. For example, you may not disclose confidential City information that you learn as a City official for the purpose of furthering the Company’s financial interests.

² Representing another person as an agent involves acting with authority on behalf of that person and in the best interests of that person with respect to a third party. Board Opinion 2014-004 at 6. Transactions involving the City include a “proceeding, application, submission, request for a ruling, or other determination, contract, lease, claim, case, award, decision, decree, judgment or legislation including ordinances and resolutions” that you have reason to believe may be subject to City action, involve the City as a party, or include a direct proprietary interest of the City. Code §20-601(27).

E. State Ethics Act

You have informed us that you have already requested an advisory opinion from the State Ethics Commission concerning the application of the State Ethics Act to your proposed outside employment. Seeking advice from the State Ethics Commission about how the Act applies is prudent. Because you are seeking an opinion from the State Ethics Commission, a discussion of the State Ethics Act is not included here.

IV. Conclusion

Thank you for your concern about compliance with the City ethics laws and for seeking advice. Advisory opinions are fact-specific, and this Opinion is predicated on the facts you have provided as stated here. If you have questions about a specific situation that arises if you choose to engage in outside employment with the Company, you can request guidance from us about those particular facts. For example, in the future you may want guidance about the application of the City gift law's exemption for gifts resulting solely from outside employment, or when filing the City financial disclosure form in 2015 you may want guidance about disclosing the outside-employment related interests you had in 2014. *See* Code §§20-604(3)(h), 20-610. 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 Regulation 4, ¶4.12.

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

BY THE PHILADELPHIA BOARD OF ETHICS

Maya Nayak
General Counsel

cc: Michael H. Reed, Esq., Chair