



CITY OF PHILADELPHIA

BOARD OF ETHICS
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**Philadelphia Board of Ethics
Non-Public General Counsel Opinion No. 2017-502**

March 7, 2017

Re: Investing in a Company in Which PIDC Is a Co-Investor

Dear City Employee:

You have requested a non-public advisory opinion about the application of the City ethics laws to your proposed participation in a particular investment opportunity related to a local, private company. Based on the facts provided, the City ethics laws do not prohibit your participation in this investment opportunity.

I. Jurisdiction

The Board of Ethics has jurisdiction to administer and enforce all Philadelphia Home Rule Charter provisions and ordinances pertaining to ethical matters. Charter § 4-1100. The Charter and the City 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 Reg. 4 ¶¶ 4.0, 4.24.

II. Facts Provided

You are a City employee. You are considering participating in a private investment opportunity involving a local, private company ("the Company"). You have supplied various documents regarding the nature and terms of this investment opportunity, including the investor deck, term sheet, and a communication from the Company answering specific questions I posed. A summary of the information you have provided follows here.

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The Company is licensed to do business in Philadelphia, and its principal office is located in Philadelphia. The Company has not purchased or leased City property, rendered services to the City, or entered into any contracts with the City, and the Company does not anticipate doing so in the future.

You are considering making a seed-stage investment in the Company. The specific investment vehicle is a convertible promissory note whereby on an assigned date, the Company would be obligated to repay both an investor's initial investment amount plus interest. If certain conditions are satisfied, portions of the investment amount and corresponding interest could be converted into equity, and an investor would become a partial owner of the Company. Depending on a number of variables, your investment may result in your having an ownership interest in the Company that is currently unknown.

You are one of several potential investors in the Company. The Startup PHL Angel Fund plans to invest in the Company in the near future. The Startup PHL Angel Fund is one of a group of public/private venture funds created by Startup PHL that are designed to provide seed-stage capital to startup companies. The Startup PHL Angel Fund is partially funded by the Philadelphia Industrial Development Corporation ("PIDC"). The majority of anticipated funds contributed by the Startup PHL Angel Fund towards the Company will originate from PIDC. The General Counsel of PIDC has confirmed that PIDC's Startup PHL Angel Fund investments are neither derived from City treasury funds nor made pursuant to contracts with the City.

According to the PIDC website, Startup PHL is a collaborative effort between the City of Philadelphia Department of Commerce and PIDC aimed at supporting entrepreneurs in the City of Philadelphia. PIDC is a non-profit organization and a public/private economic development corporation that was co-founded in 1958 by the City of Philadelphia and the Greater Philadelphia Chamber of Commerce. PIDC has close ties to the City of Philadelphia, and a number of PIDC's board members are City officials.

III. Question Presented & Brief Answer

Is it permissible for you make this proposed investment in the Company?

Yes. The City ethics restrictions do not prohibit you from participating in this investment opportunity.

IV. Discussion

As discussed below, your participation in this investment opportunity in the Company is not prohibited by the City ethics restrictions, including the Charter prohibition on interests in certain City contracts. The City ethics laws do not prohibit City officers and employees from maintaining financial interests outside City government, provided that they abide by various restrictions and requirements including those that address conflicts of interest and use of confidential City information. Additionally, many City officers and employees must file annual statements of financial interest that require, in relevant part, disclosure of sources of income and financial interests held in business entities organized for profit.

A. Prohibited Interests in Certain City Contracts

Your proposed investment in the Company would not cause you to have a prohibited interest in a City contract. City 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 City contracts. *See* Board Opinion 2014-001 at 2. The relevant Charter annotation describes the broad purpose of this prohibition: “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, 10-102 anns. The Board has explained that the goal of the Charter prohibitions on interests in City contracts is to prevent the flow of money from the City treasury to City employees through City contracts. *See* Board Opinion 2014-001 at 4.

Your proposed investment in the Company would not violate the Charter restriction on interests in certain City contracts. First, based on the information you have provided, the Company has not entered and does not intend to enter into any contracts with the City, nor does the Company intend to render any services to the City. Second, an issue does not arise under this Charter restriction because PIDC is investing in the Company through the Startup PHL Angel Fund or because Startup PHL involves collaboration between the City and PIDC. The General Counsel of PIDC has confirmed that PIDC’s Startup PHL Angel Fund investments are neither derived from City treasury funds nor made pursuant to contracts with the City. Accordingly, any interest or return on your investment in the Company will not result from money derived from City contracts.

Although PIDC was co-founded by the City, maintains close ties to the City, and a number of PIDC's board members are City officials, your investing in the Company alongside PIDC would not cause you to have a direct or indirect interest in a City contract. Rather, you, PIDC, and other investors would be contributing money into the same investment opportunity in a startup company. If the investment is successful, each investor expects to receive the respective investment amount back with interest or a potential ownership interest in the Company. Such a situation does not result in a financial obligation of the City to you or any money flowing from the City treasury through City contracts to you as proscribed by the Charter restriction on interests in certain City contracts.

B. Other Relevant City Laws

Your proposed investment in the Company does not raise an issue under the City Code conflict of interest provision. This conflict of interest provision prohibits a City employee from taking official action¹ when: (a) the City employee has a personal financial interest² in the action; or (b) a family member,³ a for-profit business of which the City employee is a member, or a fellow member of such business has a financial interest in the action. *See* Code § 20-607; Board Opinion 2013-005 at 4. Among other restrictions, this provision would prohibit you from taking official action as a City employee in which you have a financial interest by virtue of your investment in the Company or an eventual ownership interest in the Company. For example, you would be prohibited from taking official action that would affect the value of your investment or any income it may generate. *See* Code § 20-607; Board Opinion 2012-001 at 5. If you have a conflict of interest, you would be required to publicly disclose your interest and disqualify yourself from such official action as provided in Code Section 20-608. Different disclosure and disqualification procedures are required depending on whether a

¹ "Official action" is any act or omission taken by an officer or employee in his or her official capacity that requires discretion and is not ministerial in nature. Code § 20-601(17).

² A "financial interest" is defined as any interest involving money or its equivalent or an interest involving any right, power, or privilege that has economic value. Code § 20-601(9). Note, however, that the Board has opined that it is possible for a financial interest to be too remote in some cases to give rise to a conflict of interest. Board Opinion 2012-001 at 5; *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); General Counsel Opinion 2015-501 at 4 n.2 (advising that a conflict of interest does not arise for City official who may take official action regarding water rate changes and who is a Philadelphia resident water rate payer because the financial interest is not particularized to the City official and is shared by a large class of individuals).

³ A "family member" includes a parent, spouse, life partner, child, brother, sister or like relative-in-law. Code § 20-601(8).

conflict of interest is related to legislation or another type of matter. *Compare* Code § 20-608(1)(a) *with* Code § 20-608(1)(c).

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. This means, for instance, that you may not disclose confidential City information that you learn as a City employee for the purpose of furthering the Company's financial interests.

C. The State Ethics Act

The Public Official and Employee Ethics Act ("State Ethics Act"), 65 Pa. C.S. §§ 1101 *et seq.*, contains restrictions that are separate from and in addition to those imposed by the City ethics laws. 65 Pa. C.S. §§ 1102, 1103(a), 1105. The State Ethics Act applies to you given your job duties. *See* 65 Pa. C.S. § 1102 (defining "public officials" and "public employees" who are subject to State Ethics Act).

The Philadelphia Home Rule Charter grants the Board jurisdiction to render advisory opinions regarding the State Ethics Act. *See* Charter § 4-1100. The Board's authority to provide advice on the State Ethics Act is limited, and guidance from the Board regarding the State Ethics Act is not binding on any person and does not provide any protection against penalties or sanctions for a violation of the Act. Board Reg. 4 ¶ 4.4. For these reasons, provisions of the State Ethics Act that may be relevant to your request are merely outlined below. You can seek advice concerning the application of the State Ethics Act to your situation from the State Ethics Commission or the City Law Department, but note that the State Ethics Commission is the administrative agency that enforces the State Ethics Act and advisory opinions issued by the State Ethics Commission provide the greatest protection, including complete protection from Commission enforcement. *See* 65 Pa. C.S. §§ 1107(10)-(11), 1109(g); *see also* State Ethics Comm'n Order No. 1620, Oct. 8, 2013.

State Ethics Act Section 1103(a) prohibits a public employee from engaging in conduct that constitutes a conflict of interest. 65 Pa. C.S. § 1103(a). "Conflict of interest" is defined in the Act as "[u]se by a public official or public employee of the authority of his office or employment or any confidential information received through his holding public office or employment for the private pecuniary benefit of himself, a member of his immediate family or a business with which he or a member of his immediate family is associated." 65 Pa. C.S. § 1102. A conflict of interest does not include an action having a *de minimis* economic impact or affecting to the same degree a class consisting of the general public or a subclass consisting of an industry, occupation or other group that includes the public employee, a member of the employee's immediate family or a business with which the employee or a member of the employee's immediate family is

associated. 65 Pa. C.S. § 1102. A public employee is “associated” with a business for purposes of the Act if the employee is a director, officer, owner or employee, or has a financial interest in the business. A “financial interest” for purposes of the State Ethics Act is defined as “[a]ny financial interest in a legal entity engaged in business for profit which comprises more than 5% of the equity of the business or more than 5% of the assets of the economic interest in indebtedness.” 65 Pa. C.S. § 1102. The State Ethics Commission has advised that a public employee can have a conflict of interest if the employee uses the authority of his or her office or confidential information gained through holding public office with respect to a matter based upon an ongoing business relationship or a reasonable and legitimate expectation that a business relationship will form. *See* Board Opinion 2012-001 at 7 (citing State Ethics Commission opinions).

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Thank you for your concern about compliance with the City ethics restrictions and for seeking advice. Advisory opinions are fact-specific, and this Opinion is predicated on the facts that you provided, the details of which have been redacted here. If you have questions about scenarios that vary from the facts presented here, you should ask for specific advice on the application of the ethics laws to those particular facts. If you have questions about any specific situation that arises if you decide to invest in the Company and as your investment matures, you can request guidance from us about those particular facts. For example, you may in the future want guidance about the application of the City conflict of interest restriction if you become a partial equity owner of the Company. 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 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