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Dear President Brown:

Attorney General Suthers asked me to respond to your letter dated December 4, 2006, regarding Amendment 41, and to specifically address the questions you raised therein.

As an initial matter, it is important to note that while many of the prohibitions found in Amendment 41 are unambiguous, significant portions of the measure are unclear and, in fact, internally inconsistent, making concrete legal interpretations difficult. Moreover, it appears that portions of the measure, while unambiguous, are not consistent with the intent of the drafters of the measure or, more importantly, even the voters. Nonetheless, where the text of the measure is clear, we are obligated as a matter of law to provide an interpretation consistent with the text of the measure, regardless of any unintended consequences or contrary intent by the drafters. With those principles in mind, I will attempt to answer your specific questions:

Question 1: Is it permissible for a university employee to receive monetary recognition from someone other than the recipient's employer, such as the financial component of the Nobel Prize?

Amendment 41 generally prohibits government employees from accepting "gifts or other things of value" from any "person" if the gift has a fair market or aggregate value of more than $50. The monetary portion of the Nobel Prize or other similar award is clearly a "gift or other thing of value" worth more than $50. Thus, a government employee may not accept such an award if given by a "person," as that term is defined in Amendment 41, unless there is either lawful consideration in exchange for the gift or one of the enumerated exceptions applies.

"Person" is defined in the Amendment as "any individual, corporation, business trust, estate, trust, limited liability company, partnership, labor organization, association, political party, committee, or other legal entity." In the case of the Nobel Prize, the gift is from the Nobel Foundation, an entity not based in the United States. The definition of "person" includes "corporations," but does not specify whether that term includes all types of corporations (such as foreign corporations), or is limited only to registered Colorado corporations, or corporations registered in another state. Absent clarification by the legislature, the new ethics commission, or a court, however, we must apply the language literally and presume it means *any* corporation, whether it is foreign or domestic.

Assuming that the giving entity is a "person," and that the gift is worth more than $50, it may nonetheless be accepted if there is lawful consideration given for the gift or if one of the enumerated exceptions applies. The term "lawful consideration" is not defined in the Amendment, so we must apply traditional contract law principles. Colorado courts have generally defined consideration as "a benefit received or something given up as agreed upon between the parties."

The caselaw makes clear that whether lawful consideration has been given requires a case by case analysis. That said, it is also clear that past performance (i.e.: conduct made prior to the subsequent consideration) is not lawful consideration. Accordingly, the Nobel Prize or other similar award cannot be accepted if based solely on prior conduct not tied to future performance. If, however, there is a requirement that the monetary portion of the award be used for a specific purpose or in a certain manner, then the promise of future performance under those guidelines may constitute lawful consideration. For example, a research grant that must be used in a specific field of study is likely acceptable under Amendment 41 because the grant is expressly tied to future conduct, and would presumably cease if the conduct ended.

Finally, the gift may be accepted if one of the enumerated exceptions applies. Relative to the Nobel Prize or similar awards, the only possible exception is for gifts that constitute "a component of the compensation paid or other incentive given to the recipient in the normal course of employment." Although somewhat vague, this exception seems to apply to such "gifts" as annual bonuses, performance incentives, or other similar compensation that is a component of an employee's compensation package. Although the exception does not state explicitly that such compensation or incentive be provided by the employer, the phrase "in the normal course of employment" suggests that the exception does not include payments from a third party.

Thus, absent legislative clarification, it does not appear that the exception would cover the Nobel Prize or other awards not given by the University.

Question 2: Is it permissible for a university employee or the dependents of university employees to receive scholarships?

Amendment 41 prohibits gifts to any government employee or to their spouse or dependent children if the value of the gift is more than $50. As you know, University employees are government employees. Thus, the answer to this question turns on the nature of the entity giving the scholarship, the type of scholarship given, and whether there is lawful consideration given for the scholarship.

As discussed above, scholarships based solely on past performance are prohibited. Thus, for example, an open-ended scholarship given to the child of a university employee that is based solely on high school performance is prohibited. If, however, the scholarship requires some future performance, such as matriculation at a college or university, studies towards a specific degree, maintenance of a specific grade point average, or some other performance obligation, it can be argued that lawful consideration is given for the scholarship, and could therefore be accepted.

Question 3: Is it permissible for a university employee to receive a gift from someone who is not a relative or personal friend (e.g., aid from a private or non-profit entity connected to severe illness (Make a Wish Foundation) or disaster (Red Cross)?

As unfortunate as it may seem, poor drafting of the measure likely prohibits such gifts. Under the same analysis described above, a gift is prohibited if: (1) the giving entity is a "person," (2) the gift is more than $50, (3) there is no lawful consideration, and (4) none of the exceptions apply.

Under the scenario presented, the giving entity is likely a non-profit corporation and the gift would likely be worth more than $50. Corporations are included in the definition of "person," which is not limited to for-profit entities and none of the enumerated exceptions apply. Furthermore, the fact pattern does not include any future obligation owed by the recipient, similar to an obligation that might be owed by a scholarship recipient, so it does not appear that there would be lawful consideration. Absent that, and despite what is surely intent to the contrary, the text of measure would prohibit such a gift.

Question 4: Is it permissible for a university employee to receive a gift from a relative or personal friend on non-special occasions (e.g. a relative pays for a family trip not associated with a holiday, or a friend brings an expensive bottle of wine to a dinner)?

Applying the same four-step analysis described in Question 3, the answer is no. Such gifts are from a qualifying "person" (an individual), worth more than $50, not given in return for lawful consideration, and do not fall under one of the listed exceptions.

With regard to the specific exception for gifts "given by an individual who is a relative or personal friend of the recipient on a special occasion," the hypothetical presented specifically states that the gift is given on a "non-special occasion," thereby preventing application of the exception.

Nonetheless, the term "special occasion" is undefined and extremely vague. Is a family trip a special occasion? Is the giving of expensive wine a special occasion? Again, poor drafting makes it very difficult to answer these questions. Moreover, such language appears to invoke the subjective perception of the people giving and receiving the gift. Indeed, the term is so vague that, absent clarifying legislation that is consistent with the Amendment, we are unable to say with any certainty what constitutes a special occasion, or how the new ethics commission or a court might interpret that provision.

Question #5: Is it permissible for employees to receive lottery winnings, gambling proceeds, or winnings from raffles or other special contests?

If a person purchases a lottery ticket or places a monetary wager, and as a result wins a greater amount of money or some other thing of value, the prize is acceptable because the person has given lawful consideration for the opportunity to win that prize. That is, the person has actually purchased an *opportunity* to win the prize, rather than the prize itself. Accordingly, they have given lawful consideration. On the other hand, proceeds from drawings and lotteries awarded to a person who has given no consideration for the prize are prohibited under the text of the measure.

In conclusion, I hope these answers provide some guidance to you and your staff, despite the inherent vagueness of the measure. Ultimately, you may want to encourage the legislature to define some of the ambiguous terms in the measure, but I caution that legislative action cannot supplant the clear language of the measure, nor will a reviewing court necessarily be bound by the legislature's interpretation. As such, it is the Attorney General's hope that the legislature will ultimately refer a corrective measure to the ballot, thereby giving voters the opportunity to narrow the measure specifically to those items intended to have a corrupting influence over our public officials.

If you have further questions, please do not hesitate to contact me.

FOR THE ATTORNEY GENERAL

/s/ *Jason R. Dunn*

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Deputy Attorney General

Cc: All university and college presidents
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