**MEMORANDUM**

**To: Henry Wojtaszek**

**From: Ginger D. Schroder**

**Re: OTB-Right to Pay for Health Benefits for OTB Board Members**

There has been a challenge to the payment of health insurance for OTB Board members even though OTB employees receive these benefits. The question is whether such payment of benefits is not permitted under Section 502 (10) of the Racing, Pari-Mutual Wagering and Breeding Law (the “Racing Law”).

The Attorney General’s Office issued an informal opinion (Informal Opinion No. 2008-3) which responded to this very question raised by the Suffolk Regional Off-Track Betting Corporation and found that health benefits could not be granted, given the limitations of this statutory language.

The Informal Opinion of the Attorney General need not be accepted as the final statement on this question. Notably, the Attorney General acknowledges in a footnote to Informal Opinion No 2008-3 that the Office of the State Comptroller opined the opposite in 1978 and concluded that a regional OTB corporation may include its directors in a health insurance plan that it provided for its officers and employees in Opinion State Comptroller No. 78-811. The Attorney General then discards this prior State Comptroller’s ruling on the very same question by noting that the State Comptroller more recently ruled in 2007 against the availability of health benefits for Buffalo Sewer Authority Board members, who, like OTB Board members, are subject to statutory limitations as to a fixed dollar amount of compensation and reimbursement for out-of-pocket expenses.

The question has already been resolved in favor of health benefits for OTB Board members in 1978 by the State Comptroller, we can easily reject the authority of the Attorney General to opine on this issue as well as the Attorney General’s theory that this question is governed by Section 502 (1)) of the Racing Law. Specifically, the Office of the State Comptroller has issued an informal opinion in 1991 (Opinion 91-2) that correctly points out that—not only is the State Comptroller (and not the Attorney General) vested with the authority under Article X, Section 5 of the State Constitution to supervise the accounts of most public corporations, including OTB operations—but also the legislature is powerless to mandate how the State Comptroller exercises this authority. In support of this conclusion regarding its role in supervising and overseeing the accounts and expenditures of the OTB public benefit corporations, the Comptroller relies on an opinion of the New York Court of Appeals, *Patterson v. Carey*, 41 N.Y.2d 714, 724 in which the Court stated as follows:

Under the plain language of Article X, the State Comptroller is granted discretionary authority to supervise the accounts of public corporations. In exercising his discretion, the Comptroller is guided by his ‘personal responsibility and commitment to his oath of office.’ [citations omitted]. **The legislature is powerless to mandate how the Comptroller, an independently elected official, is to exercise that his constitutional discretion.** (Emphasis added.)

 Thus, it is clear that the Attorney General’s Informal Opinion No. 2008-3 is simply incorrect in basing the conclusion rejecting health benefits for OTB Board members, on Racing Law Section 502 (10). The question is one to be addressed only by the State Comptroller and the State Comptroller is not bound by any statutory restraint in exercising his constitution discretion.

This leaves us with a couple of options. First, I think it very reasonable for us to reiterate that we were not aware of any basis for denying the health insurance benefits to Board members. Moreover, we can also correctly can state that—as the Attorney General’s Office recognized in its non-binding informal opinion (AG Opinion No 2008-3), the only precedent by the authority having power to determine the issue—the State Comptroller—actually upholds providing health benefits to OTB Board members when, as here, the officers and employees of such public benefit corporation are provided those benefits.