

**STATE OF NEW YORK
COMMISSION ON PUBLIC INTEGRITY**

Advisory Opinion No. 10-03

Public Officers Law §74 does not preclude an uncompensated Chair of a public benefit corporation from employment with a private firm doing business with the public benefit corporation, provided the Chair properly discloses and recuses, and does not share in the net revenues derived from the work the private firm performs on behalf of the public benefit corporation.

INTRODUCTION

[A public benefit corporation] has asked the New York State Commission on Public Integrity (“Commission”) for an opinion regarding the application of Public Officers Law §74 to the uncompensated Chair of [the public benefit corporation] who is employed by a financial firm that [the public benefit corporation] had selected by a competitive bidding process one-and-one-half years before the Chair’s appointment to do business with [the public benefit corporation].

Pursuant to Executive Law §94(15), the Commission hereby renders its opinion that, consistent with the code of ethics contained in Public Officers Law §74, the individual may continue to serve as Chair of [the public benefit corporation] while [the public benefit corporation] continues its existing relationship with the financial firm, provided the Chair: (1) makes full disclosure in writing of his relationship with the firm to the entire [public benefit corporation] board of directors; (2) does not communicate with any [public benefit corporation] officer or employee concerning the assignment of work to the firm or the supervision of the work performed during the course of the underwriting agreement; (3) performs no services relative to

[the public benefit corporation] bond deal; (4) does not communicate with any partners or employees of his firm concerning [public benefit corporation] matters; (5) takes no part in discussions or decisions regarding the upcoming bond sale; (6) does not share with his firm any confidential information he may obtain as a result of his position at [the public benefit corporation] and; (7) does not share in the "net revenues" generated from the firm's [public benefit corporation] work. These conditions shall apply to the parties in the context of the existing business relationship between the financial firm and [the public benefit corporation]. Any new contractual agreement between [the public benefit corporation] and the firm could constitute a conflict or the appearance of a conflict of interest on the part of the Chair and, therefore, must be considered on a case-by-case basis.

BACKGROUND

Pursuant to Public Authorities Law §[], [the public benefit corporation] is a public benefit corporation whose mission is []¹ [The public benefit corporation] board consists of [] members all of whom are appointed by the Governor, with advice and consent of the New York State Senate. The members, including the Chair, serve without compensation and, thus, are not subject to Public Officers Law §73.

According to the information provided to the Commission by [the public benefit corporation], approximately [] years ago, [the public benefit corporation] made a determination to sell \$[] million in new bonds and to refinance \$[] million in variable rate debt. Numerous professional services including a financial advisor, bond counsel, and underwriters were required to facilitate these bond sales. [The public benefit corporation] conducted a competitive public

¹ []

procurement process, advertising in the Contract Reporter for a financial advisor. By [date], with the advice and assistance of the financial advisor, and in response to a separate competitive bidding process, additional professional service providers (including numerous underwriters) were selected to conduct the two bond deals.

Among the group of underwriters chosen to work on the bond deals was the firm of []. [The firm] has provided municipal underwriting and financial advisory services to State and local governments since [date]. During the first quarter of 2010, [the firm] was ranked [] nationally as senior manager for long-term, negotiated municipal transactions and served as senior managing underwriter for approximately \$[] billion in all transaction types during this same period.²

The work of the bond underwriters was to be divided for each of the bond deals (*i.e.* the \$[] million fixed rate deal, and the \$[] million refinance) and, within the division of work for each of the deals, the various underwriters would perform different functions and receive different compensation. Specifically, [the firm] and six other underwriters were chosen to underwrite the \$[] million in variable rate debt refinancing, and [the firm] was chosen as co-senior manager, along with [another firm], to underwrite the \$[] million fixed rate issue. The underwriters commenced work on both bond deals to prepare them for sale. After a decision is made to proceed with a bond sale, [the firm] and the other underwriters purchase the bonds from [the public benefit corporation] at an agreed upon price and then resell them at a price that is fixed by the market, which is expected to be higher than the purchase price the underwriters pay [the public benefit corporation]. Once [the public benefit corporation] sells the bonds to the

² [The firm's] Quarterly Review – Second Quarter 2010.

underwriters, [the public benefit corporation] has no further financial interest in the underwriters' subsequent sale of the bonds.

In [date], [the public benefit corporation] Board authorized the sale of the \$[] million in fixed rate bonds but deferred the refinancing of the \$[] million debt due to the fiscal climate. At that time, the Board approved entering into a bond purchase agreement between [the public benefit corporation] and the underwriters, [the firm] and [the other firm], as co-senior managing underwriters for the sale of the \$[] million in fixed rate bonds. [The public benefit corporation] then issued the \$[] million.

[The public benefit corporation] is now considering whether to refinance the \$[] million debt, which was first scheduled in [date] and deferred by the Board in [date]. [The firm] has substantially completed the work on this bond deal. The decision to conduct the refinancing will be made by [the public benefit corporation] Board when market conditions are favorable. The bond sale must also be approved by the New York City Office of Management and Budget, the Office of the New York City Comptroller and the Public Authorities Control Board. As selection of the underwriters was completed in [date] pursuant to a competitive public procurement process, and because [the firm] has substantially completed work on the bond sale, it will be one of the underwriters for the bond deal when it occurs. However, in accordance with standard practice in the industry, a written agreement has not yet been executed and will not be executed until [the public benefit corporation] decides to complete the \$[] million deal.

[The individual] or "the Chair" commenced employment discussions with [the firm] in [date]. [The individual], the former [] of the City of New York³, contacted the New York City

³ [].

Conflicts of Interest Board for guidance concerning his post-City employment restrictions generally as well as his prospective employment with [the firm].

On [date], Governor David Paterson announced that [] had resigned as the Chairman of [the public benefit corporation].

On [date], after his employment discussions with [the firm] had commenced but before a final employment offer was made, [the individual] was asked to serve as Chair of [the public benefit corporation]. [The individual] was formally nominated by the Governor on [date]. He was confirmed by the Senate on [date].

[The individual] began his employment with [the firm] on [date], serving as its [] and []. In this capacity, [the individual] is “responsible for developing and implementing policies related to the strategic development of the firm.”⁴ In its announcement of [the individual’s] appointment, the firm stated that [the individual] “will not conduct any business involving the City of New York. Additionally, [the individual] will not conduct business with [the public benefit corporation], where he serves as Chairman since last month.”⁵ [The individual] has informed the Commission that these restrictions are also contained in his employment contract with [the firm].

Since his employment with [the firm], [the individual] and [the public benefit corporation] have taken steps to ensure that [the individual’s] actions as Chair of [the public benefit corporation] do not result in a conflict of interest or an appearance of a conflict with

⁴ [].

⁵ Id.

respect to the potential underwriting agreement, and the supervision of the firm's work throughout the course of the bond issue, should the bond sale occur. Specifically, the Chair has made full disclosure of his employment to [the public benefit corporation] Board, first orally and later in writing, and will recuse himself from any decisions pertaining to the firm's relationship with [the public benefit corporation], including allocation of work/profits between the various underwriting firms. Additionally, the Chair will not work on [public benefit corporation] matters at the firm, nor will he communicate with any [public benefit corporation] officer or employee concerning the assignment of work to the firm (or any other underwriting firm) or the supervision of the firm's work performed during the course of the underwriting agreement. Moreover, the Chair will perform no services for the firm relative to [the public benefit corporation] bond deal and will not communicate with anyone at his firm concerning [public benefit corporation] matters. Finally, the Chair will not share in the "net revenues" generated by [the public benefit corporation] bond deal with the firm.

In an e-mail dated [], [] asked for an informal opinion to determine whether the steps proposed by [the public benefit corporation] and the Chair were sufficient to avoid a conflict of interest or the appearance of a conflict with regard to the potential bond sale.

On July 19, 2010, Commission staff responded to [the inquiry] with an informal opinion. The opinion stated that [the public benefit corporation] could continue its existing relationship with a financial firm that employs the Chair without violating the code of ethics contained in Public Officers Law §74, provided the Chair makes full disclosure of his relationship to the firm to the entire board of directors, takes no part in board decisions involving the selection of underwriting firms or his employing firm's work performed for [the public benefit corporation],

does not share in the "net revenues" generated from the firm's [public benefit corporation] work, and abides by the other relevant conditions set forth in Advisory Opinion No. 92-11, conditions set forth by [the public benefit corporation] and the opinion. [The public benefit corporation] subsequently asked the Commission to issue an advisory opinion pursuant to Executive Law §94(15) regarding the application of the Public Officers Law to [the individual's] circumstances.

APPLICABLE LAW

Public Officers Law §74, the Code of Ethics, sets forth the minimum standards governing the behavior of State officers and employees. The Code addresses the conflict between the obligations of public service and private, often personal, financial interests. The general rule with respect to conflicts of interest, Public Officers Law §74(2), is as follows:

No officers or employee of a state agency . . . should have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature, which is in substantial conflict with the proper discharge of his duties in the public interest.

Following the rule with respect to conflicts of interest, Public Officers Law §74(3) provides standards of conduct which address not only actual but apparent conflicts of interest.

Of relevancy to this inquiry are the following:

- a. No officer or employee of a state agency . . . should accept other employment which will impair his independence of judgment in the exercise of his official duties.
- b. No officer or employee of a state agency . . . should accept employment or engage in any business or professional activity which will require him to disclose confidential information which he has gained by reason of his official position or authority.
- c. No officer or employee of a state agency . . . should disclose confidential information acquired by him in the course of his official duties nor use such information to further his personal interests.

d. No officer or employee of a state agency . . . should use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others.

e. No officer or employee of a state agency . . . should engage in any transaction as representative or agent of the state with any business entity in which he has a direct or indirect financial interest that might reasonably tend to conflict with the proper discharge of his official duties.

f. An officer or employee of a state agency . . . should not by his conduct give reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is affected by the kinship, rank, position or influence of any party or person.

. . .

h. An officer or employee of a state agency . . . should endeavor to pursue a course of conduct which will not raise suspicion among the public that he is likely to engage in acts that are in violation of his trust.

DISCUSSION

On myriad occasions, the Commission has considered the application of the State code of ethics to the conflicts or the potential conflicts that can occur when private citizens with full-time, gainful employment, provide service to New York State by agreeing to serve with no or only *per diem* compensation on State boards, commissions and councils. The Commission has consistently and regularly advised volunteer State officers that they can avoid violating the State code of ethics by properly disclosing their potentially conflicting relationships and recusing themselves.⁶

⁶ The Commission has issued nineteen advisory opinions that address conflicts that may arise with unpaid and *per diem* board members. Almost half of these opinions provide for disclosure and recusal as the mechanism by which to avoid a violation of the State code of ethics. Moreover, Advisory Opinion No. 92-11 has been cited as precedent in at least twenty-five informal opinions issued by Commission staff. Finally, advisory opinions that build on the disclosure and recusal advice set forth in Advisory Opinion No. 92-11 have been cited in nearly 100 informal opinions issued by Commission staff.

The Commission's seminal decision in this area is Advisory Opinion No. 92-11, in which the Commission considered ethics issues that arose when, following the receipt of proposals from law firms to perform condemnation services for a State public benefit corporation, a board member of a public benefit corporation took a position as partner of one of the law firms under consideration by the public benefit corporation for the work. In the opinion, the Commission identified a number of concerns associated with this situation, including, among other things: duty of loyalty where conflicts arise between the law firm and the public benefit corporation; the sharing of confidential information by the board member with the law firm; influence over board members in extending preferential treatment to the law firm; and the economic interest to the board member, should the law firm contract with the public benefit corporation.

The Commission concluded that it would not be a conflict to hire the board member's law firm provided, among other things, the member makes full disclosure in writing of his relationship with the law firm to his entire board of directors; takes no part in decisions involving the selection of the law firm or the firm's work performed for the public benefit corporation; and, does not share in the "net revenues" generated from the law firm's work with the public benefit corporation.

Based on the information provided, the steps proposed by [the public benefit corporation], [the firm] and the Chair are generally sufficient to ensure that the Chair's employment with [the firm] will not pose a conflict or the appearance of a conflict of interest, especially because [the public benefit corporation] selected [the firm] long before [the individual] was appointed [the public benefit corporation's] Chair and, conversely, [the firm] began to discuss employment with [the individual] before he was appointed [the public benefit

corporation's] Chair. Additionally, [the firm] has substantially completed the work associated with the bond deal and at least three other independent regulatory bodies must approve the bond sale before it can go forward. As such, the opportunity for [the firm] or [the individual] to exercise any discretion or influence as to when or how the bond sale proceeds is minuscule. In addition, since [the firm's] compensation for the \$[] million bond sale that is still planned will be derived from selling the bonds at a market price that is higher than the agreed upon price it will pay [the public benefit corporation] for the bonds, for there to appear to be a conflict between [the individual's] interests one would have to believe that he got [the public benefit corporation] to pursue a bond sale that is not in [the public benefit corporation's] interests, convincing other [public benefit corporation] officers and board members, and further that three other regulatory bodies subsequently approved the bond sale, even though it was not in [the public benefit corporation's] interest. On these facts, the potential appearance of a conflict is simply too attenuated and contrary to the facts and logic.

Accordingly, [the public benefit corporation] may continue its existing relationship with [the firm] and [the individual] and may continue to serve as Chair of [the public benefit corporation] without violating or appearing to violate the code of ethics contained in Public Officers Law §74, provided he: (1) makes full disclosure in writing of his relationship with the firm to the entire [public benefit corporation] board of directors; (2) does not communicate with any [public benefit corporation] officer or employee concerning the assignment of work to the firm or the supervision of the work performed during the course of the underwriting agreement; (3) performs no services relative to [the public benefit corporation] bond deal; (4) does not communicate with any partners or employees of his firm concerning [public benefit corporation] matters; (5) takes no part in board discussions or decisions regarding the upcoming bond sale; (6)

does not share with his firm any confidential information he may obtain as a result of his position at [the public benefit corporation] and; (7) does not share in the "net revenues" generated from the firm's [public benefit corporation] work. With these measures in place, along with the fact that [the public benefit corporation] had a prior and continues to have an existing relationship with [the firm] that pre-dates [the individual's] employment with [the firm] and appointment to [the public benefit corporation] board, there can be no reasonable appearance that either [the individual] is securing an unwarranted privilege or that [the public benefit corporation] is being influenced in its decision-making process.

These conditions shall apply to the parties in the context of the existing business relationship between the financial firm and [the public benefit corporation]. Any new contractual agreement between [the public benefit corporation] and [the firm] could constitute a conflict or the appearance of a conflict of interest on the part of the Chair and must therefore be considered on a case-by-case basis.

The Commission also urges [the public benefit corporation] to establish a written policy to guide the evaluation and selection of underwriting firms and the assignment of work to such firms in an effort to avoid any future conflicts of interests in the selection of underwriters, negotiation of terms and the conduct of work assignments.

CONCLUSION

The Commission concludes that [the public benefit corporation] may continue its existing relationship with [the firm] and [the individual] and that [the individual] may continue to serve as Chair of [the public benefit corporation] without violating or appearing to violate the code of ethics contained in Public Officers Law §74, provided the parties abide by the conditions set

forth in this opinion. Any new contractual agreement between [the public benefit corporation] and [the firm] could constitute a conflict or the appearance of a conflict of interest on the part of the Chair and must therefore be considered on a case-by-case basis.

This opinion, unless and until amended or revoked, is binding on the Commission in any subsequent proceeding concerning the person who requested it and who acted in good faith, unless material facts were omitted or misstated by the person in the request for opinion or related supporting documentation.

All concur:

Michael G. Cherkasky
Chair
John M. Brickman
George F. Carpinello
Andrew G. Celli, Jr.
Richard D. Emery
Hon. Howard A. Levine
John T. Mitchell
Mark G. Peters
Joseph A. Spinelli,
Members

Dissenting:

Virginia M. Apuzzo
Member

December 9, 2010