

**ADVISORY OPINION
CASE NO. 03047.A
Post-Employment**

To: [Mary,], [Company Alpha]

Date: November 12, 2003

On July 1, 2002, after leaving City service, you requested an advisory opinion on whether you, in your position as a [] with [Company Alpha], a bond rating service, were prohibited by the City of Chicago Governmental Ethics Ordinance from evaluating bond transactions of the sister agencies of the City of Chicago. On September 18, 2003, the Board issued advisory opinion 02021.A in that matter.

On September 4, 2003, you requested an advisory opinion on whether you are prohibited from rating City of Chicago bonds that were issued while you were a City employee. Based on the facts presented, this Board determines that the Governmental Ethics Ordinance does not prohibit you from assisting [Alpha] (or any other person) with rating City of Chicago bonds where your City responsibilities were limited to undertaking research and collecting information that would later be used to prepare bond indenture agreements. We set forth below the relevant facts, our analysis of those facts under the City's Governmental Ethics Ordinance, and our determinations.

BACKGROUND FACTS:

Previous Advisory Opinion.

Prior to January 4, 2002, you were employed with the City's [Department] as an Assistant Comptroller. Since January 28, 2002, you have been employed with [Company Alpha] as a [] in the [.]

In a letter dated July 1, 2002, you requested an advisory opinion on what restrictions the Governmental Ethics Ordinance would impose on your post-City employment as a [] with [Company Alpha], a stock and bond rating service. Specifically, you asked if you would be prohibited under the Ordinance from “. . . evaluating bond transactions of sister agencies of the City.”

The Board issued advisory opinion 02021.A in that case, determining that the post-employment provisions did not prohibit you from assisting or representing [Company Alpha] in evaluating bond transactions of sister agencies of the City, but noting that this determination only applied to those bonds which are issued

without any involvement by the City. The Board went on to determine that the Ordinance did prohibit you, for one year from the date you left City employment, from assisting or representing any person other than the City in any transaction involving the City relating to the structuring, issuance, and administration of the debt of the City through the issuance of bonds.¹

Current Advisory Opinion.

As you did not ask the Board in your 2002 request for an advisory opinion to consider possible situations in which you perform work for [Company Alpha] on bond issues or other business transactions involving the City, we did not attempt to determine how the permanent prohibition applies to your employment with [Company Alpha]. We advised you to contact the Board for specific advice, if, in the future, you wish to or are asked to perform work with respect to a contract or transaction with which you were personally involved while a City employee. As you left City employment on January 4, 2002, any restrictions you were subject to under the one-year ban expired on January 4, 2003.

1) Employment with [Alpha]. As a [] at [Company Alpha], your primary responsibility is to evaluate the ability of public entities to timely repay their tax-exempt bond obligations. Per your letter of September 4, 2003, staff again contacted [John] to answer questions related to the process by which the City issues bonds, particularly with respect to the role of bond rating services. [John] explained that, prior to sale, bond issues must be rated by a rating service.² He said that bonds either are uninsured, in which case the rating is based on the underlying financial

¹In drafting the opinion in Case No. 02021.A, staff had asked [John], Deputy Commissioner and your former supervisor in the [Department] , to describe the process by which bonds are issued by the City. He provided the following example: First, a capital need is identified, such as financing the rehabilitation of Chicago Skyway. Second, possible revenue sources are evaluated. Third, an ordinance authorizing a bond issuance is drafted by the [Department] , reviewed by the City Council's Committee on Finance, and, if approved, is then presented to City Council for a vote. If approved by City Council, the [Department] , together with investment bankers, drafts an "indenture agreement," a written document that sets forth how the rates will be set, how the money will be invested, who will direct the investment, and the schedule for spending. Finally, the official statement of the issuance is published and the bonds go on sale to the public. The bonds are not sold directly by the City. Rather, pursuant to the indenture agreement, a broker or brokers agree to sell the particular bond issue on behalf of the City. Bonds issued by the City are either fixed rate--paying the purchaser a guaranteed rate of interest upon redemption, or variable rate--paying the purchaser a rate of interest upon redemption that changes with fluctuations in the prime rate.

²[John] stated that the rating services used by the City are [Alpha] , [Beta] , and [Gamma]. Generally, all three rating services are used for each bond issuance. Fixed-rate bonds are rated once, prior to sale, while variable rate bonds are rated annually. A sum of money (known as the "issuance fee") is set aside by the City for each bond issue for cost of issuance, which includes paying for a rating service. The City pays a fee of \$3,000 per issuance to these services for rating any fixed rate bond. For variable rate bonds, the City pays a per issuance yearly fee of \$5,000 (known as a surveillance fee) for yearly ratings.

condition of the issuer (in this case, the City), or insured, in which case the ratings are based on the financial guaranty.

According to the [Alpha] corporate web site, the ability of a public entity to repay its debt, and the subsequent rating it receives, is contingent on a number of factors. These include the historical and prospective financial condition, quality of management and operating performance of the issuer; the issuer's relationship to other obligations of the issuer; and any special features of a specific issue. You confirmed the information on the web site, and explained the rating process in more detail. [Alpha] raters (and raters from other bond rating companies), you said, review and analyze the City's financial statements, debt policies, and management practices; provide rating recommendations to [Alpha] colleagues and senior management for City bond issues; and participate in management meetings with City officials related to upcoming and outstanding bond issues. You explained that when [Alpha] rates any bond, its analysts must examine issuer's financial records, including income statements, cash flow records, and contract records, and have regular contact with the issuer's employees (in the case of Chicago, they would typically be from the [Department] and the City Treasurer's office). A review of the [Company Alpha] web site by Board staff showed more than 100 separate City of Chicago rated bond issues. In a conversation with Board staff, you stated that you might be asked to work on any of them, including some that were issued, and that you had worked on, while you were in City service.³

2) City Employment. While employed by the City, your specific responsibilities included "... proposing, reviewing, and commenting on all bond financing documents and bond structures from the start of the financing until the sale and closing of the bonds." For example, you analyzed the City's pension funds, legal settlement obligations, and tax revenues to ensure that the City would be in position to pay back the purchasers of specific bond issues. You characterized your role with the City as conducting research and gathering information which was later used to structure and issue City bonds through bond indenture agreements, a characterization with which [John] agreed. [John] stated to Board staff that, in his opinion, you did not exercise contract management authority over any City contracts. He stated that while the information you obtained and the research you did was used in structuring bonds, the decision whether to issue a bond, and final decisions relating to the structure of a bond--the interest rate, term of the bond, and details concerning the sale and monitoring of the bond--were made at his level and higher.

As noted above, the use of a rating service is a standard element of every bond issued by the City, and money is set aside in the "issuance fee" to pay for such service. You did not play any role in selecting [Alpha] (or any other rating agency) to rate any City bonds, and played no role in paying

³In a conversation with staff, you stated that, to the best of your knowledge, the Securities and Exchange Commission (which regulates the sale of bonds) does not have any rules prohibiting a person from rating bonds that they helped to create. You said that you were unaware of any other rules or regulations that would restrict your proposed activities.

[Alpha] (or any other rating agency) for rating any City bonds. You stated, and [John] confirmed, that you had no role in drafting, negotiating, or signing any agreements between the City and bond brokers for the sale of City bonds, nor did you supervise the performance of the brokers.

APPLICABLE LAW AND ANALYSIS: The Ordinance provision most relevant here is § 2-156-100, "Post-employment restrictions," which contains two sub-sections. The sub-section that applies to your case is § 2-156-100(b), which states:

(b) No former official or employee shall, for a period of one year after the termination of the official's or employee's term of office or employment, assist or represent any person in any business transaction involving the City or any of its agencies, if the official or employee participated personally and substantially in the subject matter of the transaction during his term of office or employment; provided that if the official or employee exercised contract management authority with respect to a contract this prohibition shall be permanent as to that contract.

This section of the Ordinance imposes both a one-year and a permanent prohibition on former City employees' post-employment activities. The one-year prohibition begins on the date City employment ends, not on the date an employee stops participating in specific projects or transactions. (See Case No. 94011.A, p. 7.) As the one-year period has expired, the Board need address only the permanent prohibition in this case.

The Permanent Prohibition

As a former City employee you are permanently prohibited from assisting or representing any person on a contract if, as a City employee, you exercised "contract management authority" over that contract. Section 2-156-010(g) of the Ordinance defines the term "contract management authority" as:

personal involvement in or direct supervisory responsibility for the formulation or execution of a City contract, including without limitation the preparation of specifications, evaluation of bids or proposals, negotiation of contract terms or supervision of performance.

As noted above, a review of the [Company Alpha] web site shows more than 100 separate City of Chicago bond issues listed, many of which you worked on while in City service, and any of which you could be asked to assist in rating for [Alpha]. In discussions with Board staff, you indicated that you would have to undertake a lengthy review of City and personal records to determine what your responsibilities were with respect to individual bond issues. As such a review would take an inordinate amount of time, and likely result in an opinion of inordinate length, staff advised you that the more appropriate format for this opinion would be to address your responsibilities in general terms, and provide you with general advice.

In order to determine whether the permanent prohibition places any restrictions on your post-City employment, the Board must first address the issue of whether any contracts are at issue, and whether your work at [Alpha] would constitute assistance of a person other than the City with that contract. As noted above, the City issues bonds in order to raise money for specific projects (for example, airport bonds) or for general purposes (general obligations bonds). These bonds are initially sold through brokers, pursuant to an indenture agreement. Under the terms of an indenture agreement, the bonds must be rated prior to sale. As a [] at [Alpha], you will be responsible for assisting in the rating of City bonds by reviewing and analyzing the City's financial statements, debt policies, and management practices; providing rating recommendations to [Alpha] colleagues and senior management for City bond issues; and participating in management meetings with City officials related to upcoming and outstanding bond issues. Clearly, your participation in such activities would constitute assisting a person other than the City with a City contract.

The next question is whether you exercised contract management authority over any of these bond indenture agreements. You characterized your City responsibilities as consisting of conducting research and gathering information on financial issues such as the City's pension funds, legal settlement obligations, and tax revenues. While this information was later used to structure and issue City bonds, you stated, and [John] confirmed, that you had no role in drafting, negotiating, or signing any of the indenture agreements by which the bonds were issued, rated, and sold, nor did you supervise the performance of the brokers responsible for the sale of any bonds. In addressing whether you exercised contract management authority over bond indenture agreements, the Board turns to precedent for guidance.

Case No. 94044.A involved a former City employee who had worked on a number of different projects while in City service, many of them involving preparation for the disposition of City-owned real estate. In some of those projects, the employee's participation included inspecting City-owned sites, identifying potential purchasers, and ordering and reviewing surveys and legal descriptions to determine ownership. The Board concluded these activities involved the gathering of background information that was eventually used in City contracts, and that these activities, while necessary, were not significant enough to warrant a finding that the employee had personal involvement in the formulation of City contracts (which were consummated after his City service ended.). In that case, therefore, the former employee was told that even though he participated in activities that would later be used in the preparation of City contracts, his participation did not constitute "personal involvement in the formulation of an actual City contract," and he was not prohibited "from assisting or representing any person with respect to any contract that ensues in connection with" those contracts (pg. 9).

Your activities with respect to the bond indenture agreements are similar to those of the former employee in Case No. 94044.A, although the indenture agreements were consummated while you were a City employee. As noted above, both you and [John] characterized your City duties as focusing on conducting research and gathering information that would later be used to structure and issue City bonds through bond indenture agreements. You were not responsible for the making the

decision to issue bonds, and your participation in the structure of the bonds themselves was limited to conducting research and providing financial information—the final decisions on price, interest, term, etc., were made by others. Furthermore, you did not play any role in selecting [Alpha] (or any other rating agency) to rate any City bonds, and played no role in paying [Alpha] (or any other rating agency) for rating any City bonds. Finally, you were not responsible for drafting, negotiating, or signing any agreements between the City and bond brokers for the sale of City bonds, nor did you supervise the performance of—or indeed, have any involvement with—the brokers. The Board concludes that, consistent with its determination in Case No. 94044.A, your information gathering and research responsibilities did not constitute personal involvement in formulating or supervising the performance of City contracts, and, therefore, that you did not exercise contract management authority over any of the bond indenture agreements for which you performed these activities while employed by the City. Therefore, we determine that the permanent prohibitions of the Governmental Ethics Ordinance do not prohibit you from assisting [Alpha] (or any other person) with rating City of Chicago bonds where your City responsibilities were limited to undertaking research and collecting information that would later be used to prepare bond indenture agreements. Please note that this conclusion is limited to bond indenture agreements as described above; if you are asked to work on any specific bonds where your participation was different from that described here, you should contact the Board for further guidance.

Confidential Information. We also bring to your attention Ordinance Section 2-156-070, entitled “Use or Disclosure of Confidential Information,” which prohibits you, as a former City employee, from using or revealing confidential information you acquired through your City employment. Confidential information, for purposes of this Section, means any information that may not be obtained pursuant to the Illinois Freedom of Information Act, as amended.

DETERMINATION: Based on the fact presented, the Board determines that the permanent prohibitions of the Governmental Ethics Ordinance do not prohibit you from assisting [Alpha] (or any other person) with rating City of Chicago bonds where your City responsibilities were limited to undertaking research and collecting information that would later be used to prepare bond indenture agreements. Please note that this conclusion is limited to bond indenture agreements as described above; if you are asked to work on any specific bonds where your participation was different from that described here, you should contact the Board for further guidance.

Our determination is not necessarily dispositive of all issues relevant to this situation, but is based solely on the application of the City’s Governmental Ethics Ordinance to the facts stated in this opinion. If the facts stated are incorrect or incomplete, please notify the Board immediately, as any change may alter our determination. Other laws or rules also may apply to this situation. Be advised that City departments have the authority to adopt and enforce rules of conduct that may be more restrictive than the limitations imposed by the Ethics Ordinance.

RELIANCE: This opinion may be relied upon by (1) any person involved in the specific transaction or activity with respect to which this opinion is rendered and (2) any person involved in any specific transaction or activity indistinguishable in all its material aspects from the transaction or activity with respect to which the opinion is rendered.

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Chair

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