

Blind Trust
Not-For-Profit Organizations
Charter Sections 2601(6)
 2601(12)
 2601(16)
 2604(a)(1)(b)
 2604(c)(6)

Advisory Opinion No. 94-18

A high-level public servant requested an opinion from the Conflicts of Interest Board (the "Board") as to whether, consistent with Chapter 68 of the City Charter, (1) the blind trust established on his behalf complies with Board Rule § 1-05, Definition of Blind Trust (the "Rule" or "Blind Trust Rule"), and (2) he may maintain his position on the board of directors of a not-for-profit organization in light of his position with the City.

For the reasons discussed below, it is the opinion of the Board that the blind trust agreement (the "Blind Trust") complies with the Blind Trust Rule. It is also the opinion of the Board that it would not be a violation of Chapter 68 for the public servant to maintain his position on the board of directors of the

not-for-profit organization (the "Organization").

Discussion

A. Blind Trust Agreement

The public servant advised the Board that he has a number of investments and assets, the majority of which have been placed in the Blind Trust.¹ The Board has reviewed the trust instrument and analyzed the applicable facts and law and has determined, for the reasons set forth below, that the trust agreement is consistent with the requirements of Chapter 68.

1. Establishment of the Blind Trust

The investments placed under the control of the Blind Trust include investments held in brokerage accounts, and stocks and bonds owned by the public servant and/or the public servant's spouse. The Blind

¹ All investments and holdings have been placed under the control of the Blind Trust, except for the public servant's bank accounts, his residences and those holdings where there are and will be no business dealings with the City. These investments, therefore, do not raise an issue under Chapter 68.

Trust has two trustees. Trustee A is a principal in an investment company; Trustee B is an individual investor and investment manager. The trustees are independent of any interested party to the Blind Trust, are not and have not been in business with the public servant or any interested party to the Blind Trust, and are not relatives of any interested party to the Blind Trust. In accordance with the Blind Trust Rule, the preparer of the Blind Trust filed an affidavit with the Board representing that the Blind Trust conforms to the requirements set forth in the Rule.

2. Applicable Charter Provisions and the Blind Trust Rule

Charter Section 2604(a)(1)(b) provides that no regular employee² shall have an interest in a firm which the employee knows is engaged in business

² The Charter, for purposes of Chapter 68, enumerates two categories or classes of City employees: "public servants" and "regular employees." A "public servant" means "all officials, officers and employees of the city, including members of community boards and members of [compensated] advisory committees...." Charter Section 2601(19). In contrast, a "regular employee" is defined as "all elected officials and public servants whose primary employment, as defined by rule of the board, is with the city, but shall not include members of advisory committees or community boards." Charter Section 2601(20). The public servant here has his primary employment with the City and, therefore, is a "regular employee" for purposes of Chapter 68.

dealings with the City. An "interest," in turn, is defined by Charter Sections 2601(12) and (16) as an "ownership interest in a firm or a position with a firm. . . [but not an ownership interest held] in any blind trust."

Charter Section 2601(6) defines a "blind trust" and requires that neither the public servant nor any interested party have any knowledge of the holdings in the blind trust and that the trust instrument must comply with the requirements established by rules of the Board.

In accordance with the provisions of Charter Section 2601(6), the Board promulgated the Blind Trust Rule. The Rule sets forth the requirements for the establishment of blind trust instruments, including the qualifications of the trustees and the contents of the instrument.

The Blind Trust Rule provides, in pertinent part, that a trust must be under the management and control of certain types of professionals, including, among others, a licensed attorney, a broker or an investment advisor. Further, the trustees must be independent of any interested party, must not be a current or past business associate with an interested

party and must not be a relative of any party. See Rule § 1-05(a)(1).

Discussed below are, first, the qualifications of the trustees under the Blind Trust Rule and, second, the compliance of the Blind Trust with the Rule.

As noted above, only certain kinds of professionals, meeting certain qualifications, may serve as trustees under the Blind Trust Rule. See Rule § 1-05(a)(1). As discussed more fully below, the Board concludes that the trustees here meet these requirements and, therefore, may serve as trustees for the Blind Trust.

The Blind Trust is under the management and control of two trustees. Trustee A is a principal in an investment company, licensed and registered under the Investment Advisors Act of 1940. 15 U.S.C. § 80b-3. He is also a licensed attorney. Trustee B is an individual investor and investment manager who manages major trusts for individuals and invests the portfolios of not-for-profit organizations. Trustee B has fewer than 15 clients.

As a licensed attorney, Trustee A possesses the professional credentials required by the Blind Trust

Rule. Trustee B, although not a licensed advisor, also possesses the credentials required by the Blind Trust Rule.

The Blind Trust Rule is modeled on the federal provisions governing blind trusts under the federal government's conflicts of interest provisions. Under these provisions, an approved blind trust may be managed by an "investment advisor." 5 U.S.C. App. 6 § 102(f)(3); 5 U.S.C. App. 6 § 102(f)(3)(e).³

"Investment advisor" under the federal blind trusts provisions is not limited to investment advisors registered under the Investment Advisors Act. 5 U.S.C. § 80b-3. The rules of the Office of Government Ethics in effect at the time the Board adopted the Blind Trust Rule defined "investment adviser" as "a person as defined in 15 U.S.C. § 80b-2(a)(11)...." 5 C.F.R. § 734.406(b)(5)(1991). An "investment advisor" is defined in 15 U.S.C. § 80b-2(a)(11) as "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling

³ 5 U.S.C. App. 6 governs financial disclosure by federal personnel in all three branches of government.

securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities."⁴

The Board adopted this provision because it gives the public servant some flexibility in the selection of a trustee while at the same time ensuring that the investment advisor is an individual who was experienced in investment management and did not become involved in investment activity merely to fulfill a request of the public servant.

Trustee B is an investor and an investment manager who receives compensation for advising others regarding investing, purchasing and selling securities. Trustee B manages major trusts for individuals and portfolios for non-profit organizations. Accordingly, we find that Trustee B is an investment advisor under the Blind Trust rule.

In light of the foregoing facts and legislative history, the Board concludes that, under the Blind Trust Rule, both Trustee A and Trustee B are the kinds

⁴ It should be noted that on April 7, 1992, the Office of Government Ethics amended its blind trust rule to require that a trustee be a financial institution. See 5 C.F.R. § 2634.406(a) (1993), adopted at 57 Fed. Reg. 11819-20.

of professionals who may serve as trustees of the Blind Trust.

The Blind Trust Rule contains three provisions designed to ensure that trustees have the authority and the ability to function independent of the public servant and anyone else who may benefit from the trust.

See Rule § 1-05(a)(1)(i)-(iii). These provisions require that trustees be independent of any interested party, not be an employee of any interested party, not be employed in a firm where an interested party has a substantial investment, not be in partnership with an interested party, and not be a relative of any party.

The public servant advised the Board that Trustees A and B are not related to the public servant or his spouse; are not now, nor have ever been, employed by the public servant or his spouse; are not now, nor have ever been, employed in a firm in which the public servant or his spouse has a substantial investment; are not now, nor have ever been, a partner with the public servant or his spouse; and neither trustee is, or has been, involved in a joint venture or other business or financial relationship with the public servant or his spouse. The facts provided to the Board also support a conclusion that both Trustee A

and Trustee B are independent of the public servant and his spouse and that the trustees of the Blind Trust are free from control by the public servant and/or his spouse in accordance with the provisions of the Blind Trust Rule. Thus, the trustees are sufficiently independent under the Blind Trust Rule.

3. Compliance of the Blind Trust Instrument with
Rule § 1-05

The Rule sets forth several criteria for the establishment of a blind trust instrument. These have been met by the public servant. The Rule requires that a blind trust instrument contain provisions requiring that the trustee exercise authority to manage and control the trust assets; that the trust tax return be prepared by the trustee or his or her designee and not disclosed to any interested party; that an interested party shall not receive a report on the trust's investments; that the trustee and any interested party shall not communicate about the trust; and that the interested parties shall not attempt to obtain information about the trust or its investments.⁵ See

⁵ The Blind Trust Rule, § 1-05 (a)(2)(i)-(v), requires that a blind trust instrument provide that:

- (i) the trustee in the exercise of his or her authority and discretion to manage and

Rule § 1-05(a)(2)(i)-(v).

The Board has reviewed the Blind Trust in light of the requirements of the Blind Trust Rule and found the following:

(1) The trustees, in exercising their authority and discretion to manage and control the assets of

control the assets of the trust shall not consult or notify any interested party;

- (ii) the trust tax return shall be prepared by the trustee or his or her designee and such return and any information relating thereto (except as such information may be needed by an interested party in order to complete a personal tax return) shall not be disclosed to any interested party;
- (iii) no interested party shall receive any report on the holdings and sources of income of the trust...;
- (iv) there shall be no communications, direct or indirect, between the trustee and an interested party with respect to the trust unless such communication is in writing...;
- (v) the interested parties shall make no effort to obtain, and shall take appropriate action to avoid, receiving information with respect to the holdings and the sources of income of the trust including obtaining a copy of any trust tax return file or any information relating thereto except as such information may be needed by an interested party in order to complete a personal tax return.

the Blind Trust, are not allowed to consult or notify the public servant or his spouse. See Rule § 1-05(a)(2)(i).

(2) The Blind Trust prohibits the trustees from disclosing any details of the trust assets to the public servant or his spouse and conditions disclosure of the specific assets to the tax preparer upon the preparer, the public servant and his spouse agreeing that the information will not be disclosed to the public servant or his spouse. See Rule § 1-05(a)(2)(ii).

(3) The public servant and his spouse shall not receive any report on the holdings or sources of income of the Blind Trust, except periodic reports with respect to total cash value or net income or loss of the trust. See Rule § 1-05(a)(2)(iii).

(4) All communications between the trustees and the public servant or his spouse with respect to the Blind Trust shall be in writing; and those written communications shall be limited to the general financial interest and needs of the public servant or his spouse, including requests for distribution of cash or other unspecified assets of the trust, except as otherwise provided in the Blind Trust Rule.

See Rule § 1-05(a)(2)(iv).

(5) The public servant and his spouse shall make no effort to obtain, and shall take appropriate action to avoid, receiving information with respect to the holdings and the sources of income of the Blind Trust, including obtaining a copy of any trust tax return filed or any information relating thereto, except as that information may be needed by the public servant or his spouse in order to complete a personal tax return.

See Rule § 1-05(a)(2)(v).

Based on the Board's review, the Board concludes that the Blind Trust complies with provisions of the Rule.

B. Membership on the Board of Directors

The public servant presented the Board with a request regarding his continued involvement with a non-profit organization. The public servant seeks to continue on the board of directors of the Organization, which has business dealings with the City. Chapter 68 provides that a public servant may serve as a director, officer or consultant to a not-for-profit corporation or association or other similar entity interested in business dealings with the City, provided that the public servant takes no part, directly or indirectly,

in the business dealings; the non-profit entity has no direct or indirect interest in business dealings with the public servant's agency; the public servant provides services to the non-profit entity on his or her own time; and the public servant is not compensated for the not-for-profit activity. See Charter Section 2604(c)(6).

An application of the statute to the public servant's request reveals that the factors set forth in Charter Section 2604(c)(6) have been satisfied. Thus, for the reasons discussed below, the Board concludes that the public servant may continue to serve on the board of directors of the Organization.

First, the public servant advised the Board that he will take no direct or indirect part in the Organization's business dealings with the City.

Second, the Organization has no direct or indirect dealings with the public servant's agency and is not subject to supervision, control or regulation by his agency. In any event, the Board received, from the appropriate City official, written approval of the public servant's membership on the board of directors of the Organization which stated that his membership was in furtherance of the purposes and interests of the

City. Third, his service will be performed on his own time. Fourth, the public servant will receive no compensation for his work on behalf of the Organization.

Under the factual circumstances of this case, it is unlikely that the public servant's official responsibilities will ever involve the Organization. In the event, however, that the activities of the Organization do come before the public servant in his official capacity, the public servant must recuse himself from all involvement in that matter. The public servant has also advised the Board that in his capacity with the Organization he will recuse himself from any and all matters that might come before him regarding dealings between the Organization and the City.

Recusal means that the public servant may not vote on, or otherwise involve himself in, any City matters involving the Organization, directly or indirectly. This includes, but is not limited to, participating in discussions, attending meetings, and receiving copies of relevant documents. See Advisory Opinion No. 92-5.

In this way, the public servant will be fully insulated from the issue or issues giving rise to the

recusal.

Based on the foregoing, it is the opinion of the Board that the public servant may continue to serve on the board of directors of the Organization consistent with Charter Section 2604(c)(6), subject to the conditions set forth in this Opinion. Thus, the public servant may maintain his position on the board of directors of the Organization, provided that the public servant recuses himself, in the manner described in this Opinion, from all matters relating to dealings between the Organization and the City.

Conclusion

It is the opinion of the Board that both Trustee A and Trustee B may serve as trustees of the Blind Trust for the public servant in accordance with Rule § 1-05, Definition of Blind Trust. The Board further concludes that the substantive provisions of the Blind Trust comply with the requirements of Rule § 1-05. The Board also concludes that it would not violate Chapter 68 for the public servant to maintain his position on the board of directors of the Organization, provided that the public servant recuses himself from all matters involving the Organization and the City, consistent with this Opinion.

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