

**February 28, 2019, Agenda – Open Meeting Matter**

To: The Board  
From: Christopher M. Hammer *cmh*  
Date: February 14, 2019  
Re: Proposed Board Rule: Official Fundraising

As part of its review of the Board’s existing rules, practices, and advisory opinions, Staff brings to the Board a proposed Board Rule on fundraising by public servants to benefit the City or not-for-profit organizations serving the City. This proposed Board Rule would codify the practices articulated in the Board’s advisory opinions and would align these practices with the intervening enactment of Local Law 181 of 2016, codified in Chapter 9 of Title 3 of the New York City Administrative Code (“Chapter 9”). Because the proposed rule would contain requirements for fundraising pursuant to Charter Section 2604(b)(2), codification of this rule will make it enforceable by fine, as permitted in Charter Section 2606(d).<sup>1</sup>

Staff has consulted informally with the Law Department about this proposed rule and, with the Board’s approval, will formally submit it to the Law Department and the Mayor’s Office of Operations pursuant to the City Administrative Procedure Act. See Charter Section 1043(d).

Attached are the following:

1. Advisory Opinion No. 2003-4 (**Exhibit 1**);
2. Advisory Opinion No. 2008-6 (**Exhibit 2**);
3. Chapter 9 (**Exhibit 3**);

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<sup>1</sup> Charter Section 2604(b)(2) prohibits a public servant from acting “in conflict with the proper discharge of his or her official duties.” Charter Section 2606(d), however, prohibits the Board from imposing any penalties for a violation of Charter Section 2604(b)(2) unless the violation “involved conduct identified by rule of the board as prohibited by such paragraph.”

4. Proposed Board Rule with Commentary (**Exhibit 4**); and
5. Proposed Board Rule without Commentary (**Exhibit 5**).

This proposed Rule represents the synthesis of decades of advice the Board has provided to public servants regarding the solicitation of donations to fund programs and services of City government or of not-for-profit organizations that serve New Yorkers. This advice has culminated in two comprehensive advisory opinions, Advisory Opinion Nos. 2003-4 (**Exhibit 1**) and 2008-6 (**Exhibit 2**) that articulate the Board’s interpretation of Chapter 68 as applied to official fundraising. More recently, Chapter 9 (**Exhibit 3**) establishes a regulatory and disclosure framework for not-for-profit organizations controlled by City elected officials and their agents, including certain organizations closely affiliated with City agencies.

As explained in more detail in the Commentary (**Exhibit 4**), the proposed Rule codifies much of the Board’s interpretation of Chapter 68 set forth in Advisory Opinion Nos. 2003-4 and 2008-6. Specifically, it would identify: (1) the entities for which a public servant may solicit donations; (2) the persons or entities from whom a public servant may solicit donations; (3) the disclaimer a public servant must make in connection with the solicitation; and (4) the disclosures a City agency must make about its fundraising activities.

The proposed Rule also updates the Board’s thinking regarding official fundraising in light of Chapter 9. The most significant of these changes involve not-for-profit organizations “closely affiliated with” a City agency as identified in Advisory Opinion No. 2003-4 (**Exhibit 1** at 2). This 2003-4 category is now not-for-profit organizations over which an agency head “exercises control as part of his or her City position” within the meaning of Chapter 9. See Proposed Board Rules Section 1-14(a)(1)(iii). These organizations are already subject to reporting requirements pursuant to Chapter 9, thus the proposed Rule would only require City

agencies to report donations that the agency itself receives. Non-Chapter 9 organizations would not be subject to any reporting requirements but must be designated by the agency head pursuant to proposed Board Rules Section 1-14(b) in order for an agency employee to fundraise on behalf of the organization.





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Opinions Cited: 91-10, 92-15, 92-21, 92-33, 93-15, 93-26, 94-4, 94-9,  
94-12, 94-29, 95-5, 95-7, 98-14, and 2000-04.

Benito Romano  
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**Advisory Opinion No. 2003-4**

In recent months, several elected and appointed City officials have requested opinions from the Conflicts of Interest Board (the "Board") as to whether, consistent with the conflicts of interest provisions of Chapter 68 of the City Charter, they may ask for donations from individuals and private entities, which donations would be to not-for-profit corporations for the benefit of City programs or services. More specifically, these officials request the Board's opinion as to the methods, if any, they may employ for such fundraising and from whom they may solicit funds. These requests focused the Board's attention on a variety of questions arising under earlier Board opinions regarding public servants' fundraising activities, and suggested the advisability of revisiting and clarifying some of those opinions, which we do herein.

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This opinion will focus on two issues: (1) **who** may be asked for a donation, and (2) **how** they may be asked. The Board believes that there are also important issues under Chapter 68 regarding **for whom** contributions may be sought—i.e., what entities (other than the City itself) are permissible beneficiaries of public servants' fundraising activities. It is of course clear that the City itself is a permissible beneficiary. The Board also believes that public servants may raise funds for the benefit of certain not-for-profit entities closely affiliated with the City, so long as the activities of those entities for which funds are raised support the purposes and interests of the City, rather than personal interests of the soliciting public servant. In order to ensure that fundraising for such "City affiliated" not-for-profits meets that objective, the Board will accept from City agencies and offices lists of those entities and the purposes for which they propose to seek private funding, and will determine whether these submitted entities and purposes are appropriate for fundraising by public servants.<sup>1</sup> Where the Board so determines, City officials may fundraise in support of such entities, and for such purposes, following the guidelines outlined herein, as if such fundraising were for the City itself. However, the Board will not at this time adopt guidelines regarding what other kinds of not-for-profit entities might be permissible beneficiaries of officials' fundraising. Future questions regarding these other beneficiaries will initially be addressed on a case-by-case basis through private letter rulings and the informal advice process. Ultimately, in light of this experience, the Board would expect to issue another Advisory Opinion offering guidance concerning the beneficiaries of such activities.

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<sup>1</sup> The factors the Board will consider in making such determinations include, but are not limited to, the following: (1) any appearance of favoritism toward particular not-for-profit entities created by such fundraising; (2) the impact on the beneficiary organization's competitors, if any; (3) the relationship between the mission of the beneficiary organization and City programs; (4) the importance to the City of the organization's activities; (5) the extent to which the fundraising is undertaken, or appears to be undertaken, in an "official" capacity; (6) the official's personal interest in or relationship to the beneficiary organization; and (7) whether fundraising for the organization is consistent with the public servant's official duties or appears to further only personal or political interests.

**I. Background**

The City is currently facing a budget deficit of billions of dollars. To combat the growing deficit problem, City agencies have been asked to make a variety of budget cuts, many of which require reduction of City programs and services. In order to continue providing some of these programs and services, as well as to continue to maintain their own office facilities, officials have approached the Board with requests for opinions as to whether they may directly solicit donations to the City, or to specified not-for-profit entities for support of these endeavors. These officials seek to raise funds from both individuals and companies, some of which may have business dealings with the City and/or may be affected by City regulatory controls or be eligible for City benefits. These officials, both individually and through their respective offices, propose to engage in various forms of fundraising, including personal phone calls and mailings.

**II. Relevant New York City Law and Precedent**

**A. Gifts to the City**

Charter Section 2604(b)(5) prohibits public servants from accepting “valuable gifts” from persons or entities engaged in business dealings with the City. The Rules of the Board (Title 53, Rules of the City of New York) define “valuable gift” as any gift that has a value of \$50.00 or more. See Board Rules Section 1-01(a).

The Board, however, has drawn a distinction between gifts given to individual public servants for the public servant’s personal use and gifts that are given to the City itself for the enjoyment or benefit of the City and its inhabitants. In Advisory Opinion No. 92-21, the Board wrote that “the City is well served by contributions from the public which aid the City’s efforts to meet the needs of its citizens. Philanthropy which takes the form of donations to the City

should be encouraged. This is especially true . . . when the City is under severe financial constraints.” See Advisory Opinion No. 92-21 at pg. 2. This sentiment was reflected in the earlier opinions of this Board’s predecessor, the Board of Ethics. In Board of Ethics Opinion No. 100, the Ethics Board responded to then Mayor John V. Lindsay’s request to examine “the whole problem of private contributions to the City for public purposes.” See Board of Ethics Opinion No. 100 at pg. 1. The Board reviewed several state and federal statutes governing the receipt of gifts and concluded, “[t]he general tenor of those statutes is to approve gifts for the public benefit.” Id. at pg. 6. While not addressing the question of fundraising, the Ethics Board concluded, quite forcefully, that “[c]ontributions for public purposes should be encouraged. They reflect citizen responsibility.” Id. (emphasis added). Furthermore, in Board of Ethics Opinion No. 466, the Ethics Board noted that “[i]f the making of gifts is to be encouraged, it would be altogether illogical to rule that asking for the gifts is forbidden. . . .” Board of Ethics Opinion No. 466 at pg. 1 (emphasis added).

In Advisory Opinion No. 92-21, this Board listed several factors to be considered before a public servant may accept a gift on behalf of the City. These factors included: (1) whether the donor has business dealings with the City, (2) whether the donor has an interest in a matter awaiting determination by the agency to which the gift is directed, (3) whether the donor is a sole supplier to the agency, (4) whether the donor’s contracts with the agency have been disclosed to the public, and (5) the extent to which the public servants accepting the gift on behalf of a donee agency are the same public servants who make decisions on the agency’s contracts. See Advisory Opinion No. 92-21 at pg. 3. Under this approach, if, upon application of these factors, it can be found that there is no appearance that the donor could receive preferential treatment, then acceptance of the gift is permitted. The Board has nonetheless indicated that a letter should



be sent to the donor indicating that acceptance of the gift would not serve as a quid pro quo in securing any future benefits from the City. Id.

Consistent with Advisory Opinion No. 92-21, the Board has issued numerous opinions approving of “gifts to the City.” See, e.g., Advisory Opinion No. 2000-04 (noting that a valid City purpose for acceptance of a block of tickets to an event may exist where, for example, the tickets are in turn given to homeless children temporarily sheltered by the City); Advisory Opinion No. 94-29 (permitting the New York City Department of Health to accept funds raised by a not-for-profit organization that has business dealings with the Department); Advisory Opinion No. 94-12 (noting that there may be occasions where it would be impracticable to return gifts to donors, such as when foreign dignitaries present gifts to City officials); Advisory Opinion No. 94-9 (determining that public servants who won prizes at conferences attended as part of their official duties could accept the prizes as gifts to the City, provided that the heads of their respective agencies determine that acceptance is in the City’s interest); and Advisory Opinion No. 94-4 (permitting a high-level public servant attending a conference to accept a computer as a gift to the City from a donor that had business dealings with the public servant’s agency, where donor gave a computer to 170 other attendees at the conference, provided that a letter was sent to the donor indicating that acceptance of the gift would not serve as a quid pro quo in securing any future contracts with the City). Moreover, in appropriate circumstances, Board rules permit a public servant to accept travel expenses from private entities as a “gift to the City.” See Board Rules Section 1-01(h).

Generally, the Board has viewed the acceptance of “gifts to the City” favorably if the acceptance of the gift does not create an appearance that the donor will receive preferential treatment. However, such gifts have not been permitted where acceptance may create the

appearance that the impartiality of an agency's employees is compromised, such as where the donor is engaged in business negotiations with the donee agency. See Advisory Opinion No. 92-33.

Advisory Opinion No. 92-21 also involved, in part, targeted solicitation of gifts from City vendors by the donee agency. The Board approved such solicitations without expressly considering the "coercion" issue discussed below with regard to charitable fundraising. A year later, however, in Advisory Opinion No. 93-15, on the topic of charitable fundraising, the Board noted that targeted solicitation of City vendors raised such concerns even where the solicitation was for the City itself. See Advisory Opinion No. 93-15, at fn. 5.

In the past, primarily to avoid the coercion issues raised by certain forms of solicitation, both the Board and its predecessor recommended, as an alternative to solicitation and acceptance of gifts to the City, the formation of not-for-profit corporations with the express purpose of raising funds for City purposes. See, e.g., Board of Ethics Opinion No. 100 at pg. 10; Advisory Opinion No. 92-21 at pg. 6; and Advisory Opinion No. 94-29 at pg. 4. It was thought that, by using these organizations and their employees (who presumably would not be City officials) for fundraising activities, the City might reap the benefits of receiving donations while facing "fewer ethical problems" than when City officials themselves actively solicit contributions. See Advisory Opinion No. 92-21 at pg. 6.

**B. Charitable Fundraising**

Charter Section 2604(b)(3) prohibits a public servant from either using or attempting "to use his or her position as a public servant to obtain any financial gain, contract, license, privilege or other private or personal advantage, direct or indirect, for the public servant or any person or firm associated with the public servant." "Associated," as defined by Charter Section 2601(5),

“includes a spouse, domestic partner, child, parent or sibling; a person with whom the public servant has a business or other financial relationship; and each firm in which the public servant has a present or potential interest.” Thus, Charter Section 2604(b)(3) would prohibit an official from using his or her City position or title to raise funds for any person or entity, either for-profit or charitable, with which he or she is associated. See, e.g., Advisory Opinion No. 95-5 (finding that it would be a violation of Charter Section 2604(b)(3) for a public servant, who was a member of a fraternal association by virtue of his City position, to solicit discounts for the association’s membership, inasmuch as such discounts were for the benefit of, among others, the public servant).

Fundraising by public servants may still create a risk of violating Chapter 68, even where the public servant is not associated with the person or entity for which he or she is fundraising. Charter Section 2604(b)(2) prohibits a public servant “from engaging in any business, transaction or private employment, or having any financial or other private interest, direct or indirect, which is in conflict with the proper discharge of his or her official duties.” Thus, in Advisory Opinion No. 91-10, the Board determined that charitable solicitations by public officials could violate Charter Section 2604(b)(2) if the solicitation process “is perceived to be coercive or provides an inappropriate opportunity for access to such official.” The Board’s concern was that the solicited person or entity would inevitably feel coerced to contribute by a belief or appearance that official City decisions affecting that person or entity might be influenced by whether or not a contribution was made. By the same token, there could be a public perception that, by virtue of the solicitee’s access to the public official, official conduct would be influenced positively or negatively, depending on the response to the solicitation. See, generally, Advisory Opinion No. 91-10; see also Advisory Opinion No. 98-14, at pg. 2 (finding

that an elected official's proposed letters on her official letterhead requesting that local merchants and individuals donate to a not-for-profit organization would "create the appearance the elected official is pressuring others to provide financial support to" that organization).

With these concerns in mind, the Board drew a distinction in Advisory Opinion No. 91-10 between permissible "passive" solicitation of funds, such as being an honoree at a fundraising event or having one's name listed on invitations or other communications concerning such an event, and impermissible "active" solicitation of funds, such as making personal calls or sending personal letters to potential donors. See Advisory Opinion No. 91-10 at pg. 3, citing with favor Board of Ethics Opinion No. 688; see also Advisory Opinion No. 93-15. Thus, Advisory Opinion No. 91-10 generally permitted elected officials to engage only in "passive" fundraising on behalf of charities.

In Advisory Opinion No. 91-10, the Board also drew a distinction between elected and appointed officials, ruling that it would *not* violate Chapter 68 for certain high-level *appointed* officials to take an *active* role in fundraising, so long as any solicitations were not directed to persons or firms likely to come before the officials' agencies or to be affected by their official actions. That limitation on active fundraising was deemed necessary to avoid the appearance of impropriety, any "implication that the officials are obtaining any direct or indirect personal benefits," and any "perception that their City offices are being misused as 'a lure or pressure.'" See Advisory Opinion No. 91-10 at pg. 5.

In an effort to minimize uncertainty in applying the principles set out in Opinion 91-10, the Board in Advisory Opinion No. 93-15 reaffirmed the active/passive distinction and provided "further clarification as to the meaning of 'active' fundraising." It noted that "active" fundraising "cannot be defined by simply asking whether or not a public servant took any action

whatsoever which resulted, or could result, in contributions being made to a not-for-profit organization. Under such an approach, virtually any role in a fundraising campaign could be characterized as 'active,' and would therefore be prohibited under Chapter 68." See Advisory Opinion No. 93-15 at pg. 8.

Rather, "active" fundraising was described in Opinion 93-15 as activities that

could easily create a perception, in the eyes of solicitees and of the public at large, that those who seek to do business with the official are expected, or would be well-advised, to make a contribution in order to secure access or favorable treatment. Such a perception could seriously undermine the public's confidence in the fairness and impartiality of its elected officials, and is therefore prohibited under Section 2604(b)(2) of the City Charter, which provides that:

No public servant shall engage in any business, transaction or private employment, or have any financial or other private interest, direct or indirect, which is in conflict with the proper discharge of his or her official duties.<sup>2</sup>

Accordingly the Board determined in Advisory Opinion No. 93-15 that it would be prohibited "active" fundraising for a City Council Member to solicit contributions from local merchants in the Member's district for the purpose of beautifying public parks or repairing potholes on a City street. The Board noted that by soliciting the local merchants, the Council Member was impermissibly "targeting" a group that was likely to have business dealings with the Member. See Advisory Opinion No. 93-15 at pg. 8. In contrast, the Board permitted the Council Member to include a fundraising appeal in newsletters sent out to the public at large, "which may or

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<sup>2</sup> In a footnote, the Board noted that "Charter Section 2604(b)(2) was intended to give the Board the flexibility to handle situations which present actual or potential conflicts of interest, but which were not covered by other provisions in Chapter 68. See Report of the New York City Charter Revision Commission, December 1986-November 1988, page 175." See Advisory Opinion No. 93-15, at pg. 5, n.1.

may not include persons or firms likely to seek access to the Member or to City government.” In that instance, the Board ruled, the Member was engaged in general and permissible “untargeted” solicitation. Id. at pg. 9. In approving such “untargeted” solicitations, the Board indicated that “a solicitation of this type is not generally perceived as being coercive, or as suggesting that a contributor would enjoy some special status if he or she decides to follow the Council Member’s suggestion.” Id.

In Advisory Opinion No. 93-15, the Board went on to explain that general solicitations, such as erecting signs or publishing requests in the Council Member’s newsletter, would be acceptable “passive” fundraising, even if such requests were for contributions to specific not-for-profit entities. Id. at pg. 11. The Board noted that, in determining whether a public official is participating in prohibited “active” fundraising, “the principal concern is whether or not the public servant’s actions would create an appearance that he or she is using the power of public office to pressure others into contributing, taking official action on the basis of whether or not a contribution has been made, or allowing contributors to have access to City government in a manner not enjoyed by the general public.” See Advisory Opinion No. 93-15 at pg. 8 citing, with favor, Advisory Opinion 91-10; see also Advisory Opinion No. 98-14 at pg. 3 (encouraging the use of letters sent to not-for-profit organizations “attesting to the good works of the particular organization, or offering other positive . . . comment . . . [which] the not-for-profit organization may thereafter reprint or publish . . .”); but see Advisory Opinion No. 92-15 (finding that an agency head could not serve on the honorary committee for an annual benefit of a not-for-profit organization that had a contract with her agency, where the combination of her fundraising role with her City role in approving and supervising the contract may create an appearance that the not-for-profit is receiving preferential treatment) and Advisory Opinion No. 95-7 (prohibiting a

high-level public servant from selling tickets to fundraising events for a not-for-profit organization on the board of which he served).

Later that same year, in Advisory Opinion No. 93-26, the Board determined, consistent with Advisory Opinion Nos. 91-10 and 93-15, that it would be a conflict of interest for the Brooklyn District Attorney *personally* to solicit funds for a private not-for-profit entity that was created for the express purpose of supporting the mission of the DA's office. In that case, however, the Board determined that *staff* of the Brooklyn DA's office would be permitted to engage in active fundraising for the same not-for-profit, provided that DA's staff did not solicit persons or firms likely to come before or engage in business dealings with the DA's office; that their solicitations were free from any indication that contributors would obtain personal benefits; and that the staff members did not appear to be using their positions as a lure or pressure. As further insulation against the appearance of coercion, the Board ruled that any written solicitations should include language expressly stating that contributions would not affect any future business dealings or the disposition of other matters between the DA's office and the contributor.

### III. The Law in Other Jurisdictions

#### A. New York State Ethics Commission (the "Commission") Decisions<sup>3</sup>

The Commission, like the Board, has generally permitted the acceptance of gifts to the

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<sup>3</sup> The State provision that is the parallel to City Charter Sections 2604(b)(2) and (b)(3) is considerably broader in its prohibitions. In part, the State law provides that "[n]o officer 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 discharge of his official duties in the public interest." See New York State Public Officers Law Section 74(2) (emphasis added). As an ethics code, rather than a pure conflicts of interest statute, the State law contains specific provisos regarding appearances of impropriety, such as "[a]n 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 be engaged in acts that are in violation of his trust." See New York Public Officers Law Section 74(3)(h) (emphasis added).

State, again provided that the acceptance would not result in an appearance that the donor was receiving “special” treatment. In many of the Commission’s opinions, in order to determine whether the gift resulted in an appearance that the donor was trying to obtain a benefit from the State agency, the Commission looked to the donor’s relationship to that agency (i.e., whether the donor was regulated by the agency or whether the donor had a contract or litigation with the agency). See, e.g., Commission Advisory Opinion No. 92-1 (concluding that the State Department of Agriculture and Markets [the “Department”] could accept contributions for one of the Department’s programs, but only from individuals and entities not under Department investigation or involved in litigation with the Department); Commission Advisory Opinion No. 95-38 (concluding that State Department of Environmental Conservation [“DEC”] could accept donations only from those not under investigation by the DEC or involved in litigation with the DEC); Commission Advisory Opinion No. 97-6 (concluding that the State Consumer Protection Board may not accept donations from anyone subject to proceedings of the Public Service Commission and that it must consider the source, amount, and timing of each donation); and Commission Advisory Opinion No. 97-10 (concluding that the State Office of Mental Retardation and Developmental Disabilities may not accept financial support from its vendors).

The Commission has determined that in certain circumstances State employees may *actively* solicit funds for charitable organizations, provided that the employee is receiving no personal benefit from such solicitations and, again, that the solicitations do not result in an appearance that the donor will receive preferential treatment from any State agency. See, e.g., NY State Ethics Commission Advisory Opinion No. 97-28 (determining that an employee of the Department of Environmental Conservation could, with certain provisos, solicit funds for charitable organizations). In order to address the concerns of favoritism and coercion, yet permit



solicitations, the Commission, in its Advisory Opinion No. 97-28, determined that a State employee could, acting in personal capacity, raise funds for charity, but could not solicit from those businesses or individuals which (1) had open cases at the employee's State agency in which the employee was involved or (2) had cases at the State agency within the last twelve months in which the employee was involved. See Commission Advisory Opinion No. 97-28, pg. 3. The Commission further determined that the State employee must recuse himself at his State agency, for a period of one year, from matters involving anyone from whom he has accepted a contribution.

**B. Decisions of Other States**

A review of numerous decisions from jurisdictions across the country reveals that most states permit not only the acceptance of gifts to government, but also solicitation of such gifts by public officials. Provided that the public servant receives no personal benefit from the solicitation, and provided that there is some public purpose, most, if not all, jurisdictions focus primarily on avoiding coercion. In order to strike a balance that would permit fundraising, but avoid the potential of coercion, many states prohibit soliciting from (1) any person or entity doing business with the government official or agency in question, and (2) any person or individual regulated by the government official or agency in question. See, e.g., Louisiana Board of Ethics Advisory Opinion No. 1999-992 (permitting public servants to solicit sponsorships and donations for a private not-for-profit organization, provided that the donors (1) are not seeking to obtain business with the state agency, (2) are not seeking to influence legislation (e.g., lobbyists), (3) are not regulated by the public servant's agency, and (4) do not have economic interests which may be affected by the public servant's official job duties); Florida Ethics Commission CEO Opinion 91-52 (permitting city councilwoman to solicit funds

for not-for-profit organization interested in establishing bird sanctuary in a city park, provided that solicitation is made with understanding that official action or judgment will not be influenced); Rhode Island Ethics Commission Advisory Opinion No. 98-155 (permitting solicitation by employees of the Providence Housing Authority of Authority vendors on behalf of a not-for-profit controlled by the Authority, inasmuch as solicitations do not benefit the requestors personally and there is no appearance that donors would receive unfair advantage); and Alabama Ethics Commission Advisory Opinion No. 96-101 (permitting police officers to solicit for funds and items for children's Christmas party held by a not-for-profit organization, provided that donor is not a lobbyist or a vendor to the State Capitol police or a person or business directly inspected, regulated, or supervised by the police).

The Hawaii State Ethics Commission, in particular, has noted that the responsibilities of *elected* officials could encompass officially supporting local charities, holding that it is not a misuse of position "when a legislator uses his or her position for a legitimate state purpose, such as to assist charities that benefit one's constituency or the State as a whole." See Hawaii State Ethics Commission Informal Advisory Opinion No. 99-4 at pg. 2.

**C. Federal Law**

Officers or employees of the executive, legislative, and judicial branch may not solicit or accept anything of value from a person "seeking official action from, doing business with, or (in the case of executive branch officers and employees) conducting activities regulated by, the individual's employing entity or . . . whose interests may be substantially affected by the performance or nonperformance of the individual's official duties." See 5 USC Section 7353. Federal law, however, permits each "supervising ethics office" to issue rules and regulations regarding the implementation of 5 USC Section 7353 and, where appropriate, to provide for

reasonable exceptions. See 5 USC Section 7353(b)(1).

The “supervising ethics office” in the House of Representatives is the House Committee on Standards of Official Conduct (the “House Committee”) and in the Senate, the Senate Select Committee on Ethics (the “Senate Committee”). Both of these Committees have generally interpreted the Federal law in regard to fundraising to allow solicitations on behalf of not-for-profit organizations. See, e.g., House Committee, April 4, 1995, Memorandum for All Members, Officers and Employees (permitting solicitation on behalf of charities qualified under Section 170(c) of the Internal Revenue Code (which includes 501(c) charities), provided that no official resources are used, no official endorsement is implied, e.g., no use of official letterhead, and there is no direct personal benefit to the requestor); Senate Committee Interpretive Ruling No. 438 (noting that, according to its legislative history, 5 USC Section 7353 applied “only to those gifts solicited by or given to a covered person” and concluding that “the range of activity intended to be proscribed by Section 7353 is only the solicitation and acceptance of gifts which were directly or indirectly for the federal employee soliciting the gift. Since charitable contributions . . . do not come within this general area, they are not covered by [the] prohibition on solicitation or acceptance of gifts”).

#### IV. Discussion

While gifts to the City are especially welcomed, especially in difficult fiscal times, the Board continues to believe that, unless precautions are taken, solicitation of private sector persons or entities by both elected and appointed public officials to make gifts to the City, or to not-for-profit entities directly affiliated with or directly supporting City agencies or activities,

raises serious concerns under Chapter 68.<sup>4</sup> Where a public official actively solicits such gifts, the danger is twofold. First, there remains the appearance that donors will receive preferential treatment from the City. Second, an element of coercion is introduced by the act of solicitation: when a high-ranking City official makes a personal and direct request for money, goods, or services, the prospective donor may fear that a refusal risks retaliatory action by the official, and/or may conversely believe that a contribution will yield special treatment from, or access to, the official.

The City's procurement process relies upon an open, arms-length, competitive system. See Title 9 of the Rules of the City of New York (Procurement Policy Board Rules). Any appearance of favoritism strikes at the very heart of the City's procurement rules, which strive to create an even ground where City vendors are chosen solely based on established neutral criteria. Id. Where a public servant solicits and accepts a gift to the City or a charity from a current or prospective City vendor, that may create an appearance that this vendor will receive preferential treatment, in which case Charter Section 2604(b)(2), which prohibits public servants from acting in conflict with the proper discharge of their official duties, may be violated. The same dynamic is in play beyond the procurement process, if the solicited persons and entities are subject to City regulation, or eligible for specific City benefits. In all three relationships – procurement, regulation, and City benefits – the process shares the evils attendant on the justly-criticized “pay to play” system of political contributions.

A review of Board precedent, as well as decisions from New York State, from other states, and from the federal government, indicates that donations to the government are generally

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<sup>4</sup> It should be noted that the focus of this Advisory Opinion is on solicitation of gifts *from the private sector*. Donations of goods or services from other public sector entities – e.g., free consulting or training programs provided to City agencies by the City University – present no Chapter 68 problems.

avored. In addition, with some qualifications, solicitations on behalf of the government and charities have been generally permitted, so long as they are unmarred by personal economic gain to the solicitor. But the Board, like other jurisdictions across the nation, has struggled to strike a balance between permitting public officials to use their offices for public good by raising funds for public benefit, and the potential appearance of impropriety created when high-ranking officials directly solicit individuals and entities for funds. Thus, two concerns have predominated in discussions and decisions regarding such solicitations, not only by elected officials but by all public servants: first, whether there is an appearance of coercion in the solicitation and, second, whether there is an appearance that the donor will receive preferential treatment, or undue access to the public official, if a gift is given. These two concerns may, in turn, be analyzed in terms of (1) the targeted or untargeted nature of the solicitation, and (2) the relationship of the donor to the City.

**A. Targeted vs. Untargeted Solicitations**

While the Board views its previous distinction between “active” and “passive” fundraising as a useful precedent, it now abandons that distinction in favor of a bright line distinction between “targeted” solicitations and “untargeted” solicitations. Where solicitations are not targeted to specific potential donors, there is less danger that any particular person or entity will receive, or be perceived to receive, preferential treatment as a result of a donation. Since no specific individual or business is approached – *i.e.*, all similarly situated individuals or businesses receive the same general request (*e.g.*, through a mass mailing) and are given the same opportunity to donate or decline – the appearance is avoided that any particular individual or entity will receive preferential treatment. The distinction turns not on the “active” nature of the solicitation, but upon the potentially coercive nature of personal, direct solicitations.

Arguably, a plea for funds by a public official in a thirty-second television advertisement could be deemed “active”; however, since it is not directed at any particular individual or entity, the danger of coercion is virtually nil.

“Targeted” solicitations consist of one-on-one phone calls, meetings, and personal letters directed to potential donors. Targeted solicitations may be identified either by the method of the solicitation (e.g., direct phone calls), by the content of the solicitation, or by the criteria used to identify the recipients of the solicitation. For example, a personal letter that makes clear from its contents that it is being directed specifically to the prospective donor would be a *targeted* solicitation. Likewise, a “Dear Friend” letter directed solely to vendors to the public servant’s agency would also be a targeted solicitation.

On the other hand, an individually-addressed letter that makes clear by its terms that the solicitation is in fact part of a mass mailing, will be considered *untargeted*, provided that the list of recipients was determined by criteria that were not designed to reach only “Prohibited Targets,” as defined below. “Untargeted” solicitations would also encompass mass mailings not individually addressed, flyers, public service advertisements, newsletters, speeches, press conferences, TV and radio interviews, and the like, which are directed to the public, or to large groups of potential donees generally. See, generally, Advisory Opinion No. 93-15.

Existing Board precedent permits elected officials to engage in certain untargeted fundraising on behalf of charities and also permits certain high-level appointed officials to engage in active fundraising, provided that solicitations are not made to persons or entities likely to be doing business with or subject to regulation by the official’s agency. See Advisory Opinion Nos. 91-10 and 93-15. The Board now rules that all *untargeted* solicitations by elected officials and *all* appointed public servants are permitted, so long as it is made clear to potential

donors in each solicitation that any contributions will not affect any future business dealings or the disposition of other matters between the official's office and the contributor. The Board is satisfied that such untargeted solicitations, even by elected or high-level appointed officials, do not carry a high risk of coercion, and that any such risk is outweighed by the public benefit derived from permitting such solicitations.<sup>5</sup>

**B. Targeted Solicitations**

It would be simple to draw the bright line between untargeted solicitations (permitted) and targeted solicitations (prohibited) and stop there. Nevertheless, the Board is mindful that many elected and appointed officials perceive that directly approaching sources of alternate funding for the benefit of the public is as much a part of their official City responsibilities as determining how tax revenues are spent or where spending cuts should be made. These officials argue that not only is raising funds for the public benefit *not* in conflict with the proper discharge of their official duties, but is actually an integral part of such duties. Indeed, particularly in the area of education, there are statutorily-authorized programs that either encourage or *require* City officials to solicit private sector contributions. Equally persuasively, both elected and appointed officials argue that, in many instances, direct, targeted fundraising by elected and senior appointed officials is the *most effective* means of fulfilling those responsibilities, because likely donors find it easy to ignore both non-targeted appeals and targeted solicitations from low-level officials.

Notwithstanding these valid arguments, it remains the Board's view that targeted appeals by public officials are effective precisely *because* they are inherently coercive. Thus, the Board

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<sup>5</sup> As discussed in the next section, however, the Board does not consider direct "follow-up" communications with potential donors who respond to such "untargeted" appeals to be equally harmless and still in the category of "untargeted" solicitations. Such communications are dealt with as "targeted" solicitations. (See p. 21 below.)

continues to believe that, however critical the need for private sector support, in order for elected and appointed officials to engage in targeted fundraising, safeguards must be put in place to minimize the likelihood of coercion and the appearance that the donor may receive inappropriate access or other preferential treatment as a result of the donation.

In order to achieve a balance between permitting effective fundraising and avoiding coercion and the appearance of impropriety, the Board adopts the following approach. City officials, including elected and appointed officials, may engage in direct, targeted solicitations, *except from* a prospective donor who the official knows or should know has a *specific matter either currently pending or about to be pending* before the City official or his or her agency, where it is within the legal authority or the duties of the soliciting official to make, affect, or direct the outcome of the matter. Such “specific matters” would include all phases of the procurement process for vendors to City agencies, all regulation and enforcement proceedings, and all applications to receive benefits administered by the official’s agency. The key factor is that the soliciting official should have no actual involvement in, or legal authority over, a pending or about to be pending matter involving the prospective donor. Although the Board considered identifying specific “prohibited targets” for various City offices and agencies, in the end it determined to trust in the judgment and discretion of public servants to recognize those potential donors who should not be targeted for solicitation, and to seek guidance from the Board when in doubt. A “safe harbor” alternative would be for an agency to erect “firewalls” permanently sealing the soliciting official from any involvement in making, affecting, or directing the outcome of the matter, thus permitting the official to solicit from a person or firm with a pending or about to be pending matter.



The Board also considered how to treat “follow-up” communications with potential donors who have received “untargeted” solicitations, or who, absent any solicitation, express an interest in contributing, but wish to obtain further information, or explore various ways in which they might provide support in response to the solicitation. The Board believes that any such communications between such individual prospective donors and elected or appointed officials carry the same risks of coercion, appearance of favoritism, and undue access as would “targeted solicitations” to the same donor. Accordingly, public officials may not personally pursue communications with such potential donors if targeted solicitation of them would be prohibited – *i.e.*, if they have currently pending or about to be pending matters before the official or her/his agency, where it is within the legal authority or the duties of the soliciting official to make, affect, or direct the outcome of the matter. However, such officials should be permitted (even if there are no “firewalls”) to have an initial conversation, in response to an approach by such a potential donor, at which time the official may thank the prospective donor for the expression of interest, and direct him or her to an appropriate person who may engage in further detailed discussions – *i.e.*, either (a) an employee (perhaps one specifically designated for the purpose of such follow-up solicitations) who has no authority to determine, affect, or direct the outcome of any agency action affecting the potential donor, or (b) an employee of the not-for-profit entity that is to be the recipient of the donation.

For purposes of these restrictions, the “agency” of an elected official except the Mayor and members of the Council, but including the Public Advocate, Comptroller, Borough Presidents, and District Attorneys, is his or her office. For the Mayor, it is the Executive Branch of City government, as defined in Charter Section 2604(d)(3), and for members of the Council, it is the Legislative Branch. Public servants remain free to engage in *untargeted* solicitations

through speeches, press conferences, interviews, and mass mailings. **In all cases, however, both untargeted or targeted, solicitations must make clear that the donor will receive no special access to City officials or preferential treatment as a result of a donation.**

**C. Public Disclosure of Donations**

As an additional safeguard, all City offices and agencies (including, without limitation, those of all elected officials) will be required to publicly disclose twice a year all donations received by them to either the City or to a not-for-profit entity affiliated with that office or agency, which exceed \$5,000 in aggregate value from a single donor.<sup>6</sup> More particularly, each office or agency must file a public report with the Board by May 15 and November 15 of each year (commencing November 15, 2003), disclosing (a) the name of each person or entity making a donation in the six-month period ending March 31 and September 30 respectively, (b) the type of donation received from each such person or entity (i.e., money, goods, or services), (c) the purpose of the donation (e.g., renovation of Gracie Mansion), (d) the estimated value of all donations received during the reporting period from each such person or entity, and (e) the cumulative total value of gifts received from each such person or entity over the past twenty-four (24) months.<sup>7</sup> If the agency is unable reasonably to estimate the value of a donation of goods or services, then the agency may describe the goods or services with sufficient particularity to

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<sup>6</sup> See Arkansas Code Section 21-8-804(c) (requiring that public officials accepting gifts, grants, or donations of money, disclose, on a quarterly basis to the Arkansas Ethics Commission (1) the gift, grant, or donation received, (2) the person donating the gift, grant, or donation of money, and (3) the estimated value of the gift, grant, or donation. See also, Municipal Code of Chicago Section 2-156-040(f) (requiring gifts to the City be reported to the Board of Ethics and the Comptroller, who will then "add [the gift] to the inventory of City property").

<sup>7</sup> The Board considered, but upon deliberation rejected, a requirement that officials disclose the identity of all persons and firms *solicited* for contributions in targeted appeals, whether or not a donation was received. Such a requirement might ensure that parties were not disfavored by their declination to contribute. On the other hand, listing those who fail to give could well be seen as overwhelmingly coercive, as well as, in some cases, unfairly embarrassing.

enable readers of the disclosure statement to make a judgment as to the value of the gift.

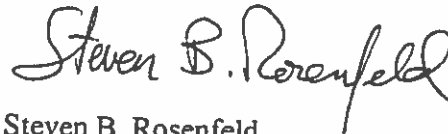
Monetary values shall be reported as being within one of the following categories: A if it is \$5000 to under \$20,000, B if it is \$20,000 to under \$60,000, C if it is \$60,000 to under \$100,000, D if it is \$100,000 to under \$250,000, E if it is \$250,000 to under \$500,000, F if it is \$500,000 to under \$1,000,000, and G if it is \$1,000,000 or more.

The Board recognizes that certain larger agencies (e.g., the Department of Education) may encounter considerable administrative or other difficulties collecting data on, and disclosing, donations of relatively small magnitude solicited and received not by the central office, but by officials in local offices or schools. In such cases, the Board would anticipate acting favorably on requests for *partial* waiver or modification of the disclosure requirement with respect to such small donations under terms and conditions otherwise consistent with this Opinion. The Board also recognizes that there may be situations in which security, public safety, or confidentiality concerns may preclude such disclosure of certain donations, and the Board will entertain requests for waiver of the disclosure requirements when such situations arise.

#### V. Board Decision

It would not be a violation of Chapter 68 for the City officials whose requests for advice prompted this Advisory Opinion to solicit donations for the purposes indicated in their requests, so long as such solicitations are conducted in conformity with the requirements and procedures set forth above.

To the extent that this opinion is inconsistent with any past Board opinions, those opinions are superseded.<sup>8</sup>



Steven B. Rosenfeld  
Chair

Angela Mariana Freyre

Bruce A. Green

Jane W. Parver

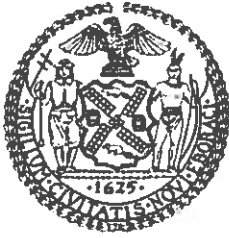
Benito Romano

Dated: May 7, 2003

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2002-429.ao/jhh

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<sup>8</sup> As noted at the outset of this Opinion, the Board expects, for the present, to consider questions regarding the permissible beneficiaries of fundraising by public servants (other than the City itself and City affiliated not-for-profits "pre-cleared" by the Board) on a case-by-case basis through requests for private letter opinions or informal advice.



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## **Charitable Fundraising**

Charter Sections: 2601(5), 2604(b)(2) and (b)(3)

Opinions Cited: 91-10, 92-15, 93-15, 95-2, 98-14, 2000-3, 2003-4

### **Advisory Opinion No. 2008-6**

In Advisory Opinion No. 2003-4 the Board addressed the question of fundraising by City officials for the City itself and for not-for-profit entities closely affiliated with City offices and agencies. But the Board reserved the question of “what *other* kinds of not-for-profit entities might be permissible beneficiaries of officials’ fundraising” (*id.* at 2 (emphasis added)), preferring to consider that question on a “case-by-case basis,” leading to a possible future advisory opinion based on its experience with those cases. On the basis of its experience in the intervening five years, the Board now issues that anticipated opinion.

### **Background**

In Advisory Opinions preceding No. 2003-4, the Board did give some consideration to fundraising by public officials in their official capacities for

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charitable entities that were not affiliated with the City.<sup>1</sup> In Advisory Opinion No. 91-10 the Board observed that

“[i]t is surely in the City's interest to encourage the voluntary financial support of community groups, educational institutions and charities, inasmuch as their good works help to sustain the life of the City and indeed are indispensable to it.” (*Id.* at 2.)

The Board noted, however, that official fundraising for such entities could create “an appearance of impropriety” if the official’s action is “perceived to be coercive or provides an inappropriate opportunity for access to such official.” *Id.* Such an appearance would implicate Charter Section 2604(b)(2), which forbids public servants from engaging in any transaction, or having any private interest, that is in conflict with the proper discharge of their official duties. In order to allay concern for the potential of coercion if elected and high-ranking appointed officials were given full rein to solicit charitable contributions, the Board in Opinion No. 91-10 adopted a distinction between “active” and “passive” fundraising, ruling 1) that elected officials could engage only in passive fundraising (*e.g.*, serving on honorary committees for charitable events), but not in active fundraising, and 2) that high-ranking appointed officials could engage in active fundraising, but only so long as they did not direct their solicitations to those likely to have matters before their City agency.

The “coercion” concern also underlay Advisory Opinion No. 93-15, in which the Board attempted to clarify the distinction between active and passive fundraising. Observing that not

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<sup>1</sup> Those opinions did not address fundraising by public servants in their *personal* capacities, such as fundraising for their alma maters, their places of worship, or their block associations. Nevertheless, even such personal charitable activity, like other private activity, may be restricted by Chapter 68. For example, public servants may not use City time or resources for such personal fundraising; nor may they direct solicitations to those who have matters before them at their City agencies. See *COIB v. King*, COIB Case No. 98-508 (2001). Like those earlier opinions, this opinion will instead address charitable fundraising by City officials in their *official* capacities.

all actions that might result in contributions to a charity would be deemed “active,” the Board found the relevant question to be whether “the public servant’s actions would create an appearance that he or she is using the power of public office” to pressure or coerce others to make contributions, or to afford greater access to government to those who made contributions. *Id.* at 8-9.

In its pre-2003 rulings on official fundraising for charitable entities not affiliated with the City, the Board also expressed a concern regarding the appearance of official “endorsement” of favored beneficiaries over other worthwhile charities competing for scarce philanthropic resources. In Advisory Opinion No. 92-15, for example, the Board determined that an agency head could not serve on the honorary committee for the annual benefit of a not-for-profit entity that had a contract with her agency, ruling that “the combination of her fundraising role with her role in approving and supervising the contract may create an appearance that the not-for-profit entity *is receiving preferential treatment.*” Opinion No. 92-15 at 1 (emphasis added).

In Opinion No. 2003-4, as noted above, the Board considered in considerable depth City officials’ solicitation of private support for the City itself and for not-for-profit organizations closely affiliated with City offices and agencies. In that opinion, the Board abandoned the distinction between “active” and “passive” fundraising, in favor of a bright line distinction between “targeted” and “untargeted” solicitations – the former consisting of direct appeals such as one-on-one phone calls, meetings, and personal letters to potential donors, the latter of such devices as mass mailings not directed to specific potential donors. *Id.* at 17. In holding that all *untargeted* fundraising for the City and its affiliated not-for-profits would be permitted, the Board again evinced its concern over the “coercion” factor:

Where solicitations are not targeted to specific potential donors, there is less danger that any particular person or entity will receive, or be perceived to receive, preferential treatment as a result of a donation. Since no specific individual or business is approached – *i.e.*, all similarly situated individuals or businesses receive the same general request (*e.g.*, through a mass mailing) and are given the same opportunity to donate or decline – the appearance is avoided that any particular individual or entity will receive preferential treatment. The distinction turns not on the “active” nature of the solicitation, but upon the potentially coercive nature of personal, direct solicitations. (*Id.* at 17-18.)

In addition, the Board also determined that targeted solicitations for the City and its affiliates would be permissible, provided that no official could solicit any person or firm with a matter “pending or about to be pending before the City official or his or her agency, where it is within the legal authority or the duties of the soliciting official to make, affect, or direct the outcome of the matter.” *Id.* at 20. In the case of both targeted and untargeted solicitations, the Board required that the solicitation must make clear that the decision whether or not to give would result in no official favor or disfavor for the person or entity solicited, and would yield no special access to the official or his or her agency. Finally, the Board required City agencies and offices to report every six months all gifts in excess of \$5,000 in aggregate value from a single donor. *Id.* at 22.

Because Advisory Opinion No. 2003-4 addressed fundraising only for the City itself or for not-for-profits determined to be closely affiliated with the City, the concern regarding possible “endorsement” of particular charities was not present. The Board recognized, however, that when it turned to official fundraising on behalf of not-for-profit entities that are *not* affiliated with the City, both the coercion and the endorsement concerns would again be implicated.

As anticipated in Opinion No. 2003-4, the Board has, over the past several years, received numerous requests for advice from public servants regarding proposed official



fundraising efforts on behalf of charitable entities that could not be considered to be “affiliated” with the City. A sampling of those requests is as follows:

1. An elected official with citywide responsibilities sought to become co-chair of a specific fundraising program for a national not-for-profit organization with a national agenda, and in that capacity to use his City position to solicit funds for that program. The specific program was one that, the elected official determined, would support a major initiative of the official’s City office.
2. Another elected official proposed to participate in his official capacity at a public fundraising event in the City to “kick off” a major fundraising initiative by a charity with a statewide mission. The beneficiaries of the charity’s services included many thousands of residents of the City and of the area served by the elected official.
3. An agency head who sat on the board of directors of a not-for-profit organization dedicated to finding a cure and better treatment for a particular disease – a cause not significantly related to the work of the City agency headed by the official – asked whether it was permissible to raise money for the organization so long as no vendors or contractors of the agency were solicited.
4. Another agency head asked whether he, and two of his deputies, could solicit funds for a national not-for-profit that he had been instrumental in forming, the purpose of which was to engender, on a national level, federal and state policies and funding supportive of initiatives adopted by the official’s own City agency. The agency head served on the organization’s board, service that he believed was part of his City job.

5. A third agency head asked whether he could consent to the request of his alma mater to begin raising funds for a campus building to be named in his honor; the request did not contemplate that the City official would himself participate in such fundraising.
6. An elected official asked whether charitable foundations could be approached by the official and urged to consider contributing to not-for-profit entities across the City whose annual funding by the City Council had recently been cut due to fiscal constraints.

### Discussion

As noted, Opinion No. 2003-4 reserved for a future day the question of what charitable entities, besides City-affiliated not-for-profits, could be the beneficiaries of official fundraising by City public servants. While earlier Board opinions had directed some attention to the question of which City officials could engage in charitable fundraising and by what methods, those opinions had given little attention to the question of which charities could benefit from that activity. This opinion will address all three questions: for whom, by whom, and how.

#### 1. Permissible Beneficiaries of Fundraising

In determining what not-for-profits not “affiliated” with the City may nevertheless be the beneficiaries of official fundraising, the Board has kept in mind both the “endorsement” concern and the fact that it was being asked about public servants’ fundraising in their official capacities – *i.e.*, as part of their City jobs, on City time, and using City resources. Without at all denigrating the Board’s recognition in Advisory Opinion No. 91-10 that “it is in the City’s interest to encourage the voluntary financial support of community groups, educational institutions and

charities,” it is surely not within the scope of every public servant’s official duties to raise funds for any and every such group, institution, or charity, wherever located and whatever its mission.

Thus, the Board has concluded, first, that the not-for-profit for which funds are sought must have some nexus with the City and its residents. Thus, for example, an arts organization in California or an affordable housing provider in Buffalo will not be permissible beneficiaries of official fundraising by City public servants. This restriction is dictated by the requirement, most specifically enunciated in Board Rules Sections 1-13(a) and (b), that public servants may not use City time or resources for non-City purposes.<sup>2</sup>

Second, the mission of the beneficiary not-for-profit must have some connection with the mission or duties of the office or agency of the soliciting official. For example, while a not-for-profit organization dedicated to increasing affordable housing in the City might well be an appropriate beneficiary of fundraising by, for example, the Commissioners of Housing Preservation and Development and of Homeless Services, it would not be a permissible beneficiary of official fundraising by the Cultural Affairs Commissioner – although the latter could fundraise for a local performing arts group. This restriction is again based on the notion that the activity must bear some relationship to the soliciting official’s *City* responsibilities – and the realization, discussed below (p. 10), that it is often part of City officials’ duties to award City contracts and/or to distribute scarce City funding among competing not-for-profits working within their areas of responsibility. Admittedly, this limitation will impose greater restrictions

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<sup>2</sup> This would not preclude City officials, as noted above (footnote 1), from engaging in fundraising efforts on their own time, and without the use of City letterhead or resources, for their alma maters and other favored charities, wherever they may be located, provided that they may not direct solicitations to those who have matters before them at their City agencies.

on agency heads with defined areas of responsibility than it will, for example, on the Mayor, the Public Advocate, and City Council Members, whose official responsibilities are defined quite broadly. Nevertheless, even for these elected officials, the not-for-profit in question must have some connection not only with the City itself but also with the responsibilities of the soliciting official. Thus, for example, fundraising by a Borough President for the benefit of a theatre group in another borough would probably not qualify; nor would a Councilmember's solicitation for a community group operating wholly outside his or her district.

Third, even if the not-for-profit provides services in the City and within the portfolio of a given elected official or agency head, such fundraising will not be permissible if the elected official or agency head has a personal "association" with the entity or its staff within the meaning of Charter Section 2601(5).<sup>3</sup> Pursuant to Charter Section 2604(b)(3), any use of a public servant's office to benefit such an "associated" person or entity is strictly prohibited – and fundraising is no exception. Thus, for example, and without limitation, if the soliciting official or her designee serves on the board of a not-for-profit, official fundraising for the benefit of that entity would be barred.<sup>4</sup> Likewise, if a spouse, a sibling, or a business partner of an agency head serves as a charity's executive director or other high-ranking staff member, then that agency head will also be barred from taking official actions seeking support for that charity. In short, if

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<sup>3</sup> Charter Section 2601(5) defines those "associated" with a public servant to include "a spouse, domestic partner, child, parent, or sibling; a person with whom the public servant has a business or other financial relationship; and each firm in which the public servant has a present or potential interest."

<sup>4</sup> The Board does recognize an exception to this prohibition where the official serves on the entity's board of directors as part of his or her City job. Such *ex officio* positions may occur as a matter of law (*e.g.*, a statute provides for the appointment) or may occur *de facto* (*e.g.*, the official serves on the board only for his or her term in office). In such cases, the conflicts of interest law will not prohibit fundraising because, unlike the case where the official serves the not-for-profit in his or her personal capacity (*e.g.*, as an alum), the *ex officio* board member has no private interest that conflicts with his or her public duties.

the elected official or agency head has a personal association with a not-for-profit, neither the official nor the agency may solicit support for the not-for-profit. Likewise, even if the elected official or agency head is not personally associated with the not-for-profit, the official may not assign fundraising responsibilities to any subordinate who is so associated.

The Board has considered but rejected imposing additional restrictions on the types of entities for which City officials may seek private funding. For example, the Board considered whether an agency head should be prevented from fundraising on behalf of entities with which his or her agency contracts or, conversely, whether such fundraising should be limited to groups with which an agency already contracts. The Board rejects both limitations. As to the latter, the Board observes that City agencies have limited budgets and priorities, but may identify excellent not-for-profit organizations that they are currently unable to fund. The Board sees no reason why an agency head may not seek private support for such organizations. On the other hand, the City may be contracting with organizations to provide vital services to New York's most needy residents but, especially in difficult economic times when these services may in fact be most needed, these organizations may be experiencing shortfalls in both public and private funding. The Board can find no basis in Chapter 68 for concluding that City officials may not seek private support for the very organizations that, as part of their official duties, they have identified as worthy of receiving public funding were it available.

With regard to the "endorsement" concern, the Board has, for similar reasons, concluded that permitting officials to seek funding for given not-for-profit organizations within their areas of responsibility does not impermissibly favor such organizations over those not so supported. In reaching this conclusion, the Board does not reject prior decisions, including Opinion No. 92-

15, discussed above, that expressed such an “endorsement” concern. Those opinions were summarized in Advisory Opinion No. 2000-3, which permitted Police Commissioner Safir to author a letter that would serve as an introduction to a book being published to raise funds for the Police Museum, a not-for-profit entity not affiliated with the City. In Opinion No. 2000-3, the Board noted that its earlier decisions, though generally prohibiting official endorsement of such enterprises as books or films, nevertheless admitted of circumstances where such an endorsement would be appropriate, particularly where “the City’s interest [is] the clear determinant for the endorsement.” Advisory Opinion No. 95-2 at 4. Where such a “City interest” can be identified, permitting officials to make distinctions with regard to private fundraising does not allow for “favoritism” among competing not-for-profit entities any more than when they are required by their official duties to make such choices in designating specific not-for-profits for *public* budget support (see 9 Rules of the City of New York Section 1-02(e)). In addition, elected officials and agency heads regularly decide, consistent with the Board’s Valuable Gift Rule, Section 1-01, which invitations to charitable fundraising events to accept, and elected and high-ranking officials may decide to which not-for-profit organizations they will provide congratulatory letters to be included in the organization’s fundraising materials (see Advisory Opinion No. 98-14).

The Board sees no merit in a rule that would require City officials to support all City charities or to support none. Indeed, the Board could enunciate no selection criteria beyond those outlined above (nexus to the official’s office or agency and no disqualifying personal interest) that would be both consistent with Chapter 68 and not so general as to be ultimately meaningless. Elected and appointed officials are selected for, among other things, their good judgment, and the Board finds no basis in Chapter 68 to limit the discretion of these officials as

to their official charitable fundraising if they are exercising discretion within their defined areas of responsibility, and if they are barred (as they always are) from furthering their own or their associates' personal interests. The Board is satisfied that the protections afforded by, for example, the City's comprehensive procurement regulations, as well as the ultimate protection afforded in the ballot box, are, in the language of Opinion No. 95-2, sufficient "safeguards...to protect against the appearance that some private organizations are receiving preferential treatment at the expense of other, similarly situated organizations." *Id.* at 4.

## 2. Who May Engage in Fundraising

The Board next determines that official charitable fundraising by City officials may be undertaken only by elected officials and agency heads, or by their specified designees, and only after a personal determination by the elected official or agency head of which not-for-profits will be supported. Elected officials and agency heads are in the best position to make the determinations as to which not-for-profits qualify under the criteria set forth above, and while they may delegate the actual solicitations, they themselves must make the determination that the work of the not-for-profit in question supports the mission of their City office or agency, so that it is a permissible beneficiary of its official fundraising. Unless those judgments are reposed in high-level officials, it would leave virtually any City employee free to use City time and resources for the benefit of favored private charities, with the attendant risks of misuse of that time and resources, as well as undirected judgments about which entities should receive the support of City fundraising efforts.

### 3. How Fundraising May Be Conducted

Finally, the Board concludes that official solicitations for “unaffiliated” not-for-profits should comply in all respects with the procedures and limitations for fundraising on behalf of the City and City-affiliated entities, as set forth in Opinion No. 2003-4. As noted above, these procedures were, in the main, designed to avoid the appearance of coercion. Thus, the Board determines that untargeted solicitations for unaffiliated not-for-profits will be permissible, as well as those targeted solicitations not made to those persons or firms with matters pending or about to be pending before the office or agency of the soliciting official. Further, as required in Opinion No. 2003-4, all such solicitations *must contain an explicit statement* that a decision to give or not give will have no impact on any official action and will likewise have no impact on access to City government officials.

Opinion No. 2003-4 also contained a requirement that agencies report to the Board, every six months, a list of all contributions over \$5,000 from private sector sources received by the agency or its affiliated not-for-profits.<sup>5</sup> The Board believes that a similar reporting requirement with respect to fundraising for unaffiliated entities would help ensure that the restrictions set forth in this Opinion are followed. However, the Board realizes that City officials are not in a position to know what contributions may have been received by unaffiliated entities as a result of their fundraising efforts, and that it would place an unfair burden on the recipient entities to keep track of and report such contributions. Beyond that, requiring such reporting might have the

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<sup>5</sup> The Board emphasizes that the instant opinion concerning not-for-profits *not* affiliated with the City in no way relieves City officials from their responsibilities set forth in Opinion No. 2003-4 concerning City-affiliated entities, including, without limitation, the officials’ responsibilities to pre-clear with the Board their fundraising for such entities and to make the above-referenced reports of contributions.



undesired effect of increasing the appearance of coercion that the Board's restrictions are designed to minimize. Accordingly, in the case of unaffiliated entities, the Board will require agency heads and elected officials to report to the Board every six months only the identities of those not-for-profit organizations for which the office or agency sought private support.<sup>6</sup>

#### 4. Dispositions of Requests for Advice

To illustrate the application of the foregoing determinations to specific cases, we now return to the six individual requests for advice described above. In response to those requests, the Board advised as follows:

1. The elected official with citywide responsibilities was permitted to become co-chair of a fundraising program of a national not-for-profit organization, and to use his City position to solicit funds for that program, because the specific program was one that the elected official had determined, within the scope of his official duties, would support a major initiative of his City office.
2. Similarly, the elected official who proposed to participate in his official capacity at a public fundraising event in the City to "kick off" a major fundraising initiative by a charity was permitted to do so, because the beneficiaries of the charity's services included many thousands of residents of the City and of the area served by the elected official.

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<sup>6</sup> The reporting cycle will be the same as provided for in Opinion No. 2003-4—no later than May 15 and November 15, for the six month periods ending March 31 and September 30, respectively. The Board will make such reports public.

3. An agency head, as well as two of his deputies, were permitted to solicit funds for a national not-for-profit, based on the agency head's determination that the organization furthered, on a national level, initiatives adopted by the official's own City agency; the agency head's service on the organization's board was determined to fall within the *ex officio* exception (*see* footnote 4, *supra*), because he served on the board as part of his City job. However, the agency head was expressly cautioned that – as required by Advisory Opinion No. 2003-4 – no solicitations could be directed to any person or firm with a matter pending or about to be pending before him or his agency.
4. In contrast, the agency head who sat on the board of directors of a not-for-profit organization dedicated to finding a cure and better treatment for a particular disease was advised that she *could not* fundraise for that organization in her official capacity – both because the organization's mission was not significantly related to the work of the City agency headed by the official *and* because she sat on its board in her personal capacity (*i.e.*, not *ex officio*). However, she was free to raise money for the organization in her personal capacity – *i.e.*, without using City time or resources – so long as no vendors, contractors, or employees of the agency were solicited.<sup>7</sup>

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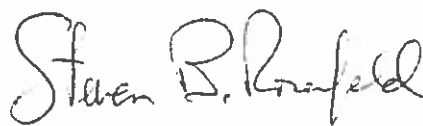
<sup>7</sup> A recent Board enforcement disposition reinforced this prohibition, also noted herein at footnote 1, against using one's City position for the benefit of an entity with which one has a *personal* association within the meaning of Charter Section 2601(5). *See COIB v. Cosgrave*, COIB Case No. 2007-290 (2008), where the Board issued a public warning letter to an agency head for providing a list that included the representatives of firms with present and potential business before his agency to an out-of-state not-for-profit on whose board he served in order that these individuals might be invited to a fundraising event of the not-for-profit.

5. The agency head who asked whether he could consent to his alma mater raising funds for a campus building to be named in his honor was advised that he could, so long as (a) he did not himself participate in such fundraising while he remained in office; (b) no vendors or contractors of his agency would be approached for donations; and (c) the City official would not be told who had made donations.
6. The elected official was permitted to urge charitable foundations to consider contributions to not-for-profit entities across the City whose annual funding by the City Council had recently been cut due to fiscal constraints, so long as no distinctions were made among beneficiaries falling into that category (other than sorting such entities according to fields of charitable endeavors supported by each foundation). The Board concluded that, unlike an agency head making determinations among not-for-profits within his or her area of responsibility, it was not within the elected official's City duties to make such distinctions, and doing so would thus raise the "endorsement" concern.

### Conclusion

Elected officials and agency heads, and their designees, may in their official capacities, using City time and resources, solicit and otherwise encourage private contributions to not-for-profit organizations, after a personal determination by the elected official or agency head that the not-for-profit's work supports the mission of their City office or agency. Such solicitations must include a statement that a decision whether or not to give will not result in official favor or disfavor. But they may not target for these solicitations any person or firm with a matter pending

or about to be pending before their City office or agency, and they may take no such action on behalf of any organization with which they are associated or that would benefit a person or firm with whom or which they are associated. Each City office or agency must file a public report with the Board by May 15 and November 15 of each year disclosing the identity of each not-for-profit organization for which the office or agency sought private contributions in the six-month period ending March 31 and September 30.



Steven B. Rosenfeld  
Chair

Monica Blum  
Kevin B. Frawley  
Angela Mariana Freyre  
Andrew Irving

Dated: December 29, 2008

2008-743ao/wh

## Chapter 9: Organizations Affiliated with Elected Officials.

### § 3-901 Definitions.

As used in this chapter, the following terms have the following meanings.

**Doing business database.** The term "doing business database" means the doing business database as defined in section 3-702 of the administrative code.

**Donation.** The term "donation" means any contribution from a non-governmental source, including in-kind donations, gifts, loans, advances or deposits of money, or anything of value.

**Elected official communications.** The term "elected official communications" means a communication in the form of: (i) radio, television, cable or satellite broadcast; (ii) printed material such as advertisements, pamphlets, circulars, flyers, brochures or letters; (iii) telephone communication; or (iv) paid internet advertising; which includes the name, voice or likeness of the person holding office as mayor, comptroller, public advocate, borough president or member of the council with whom the entity making such communication is affiliated. Elected official communications do not include: (i) communications with a professional journalist or newscaster, including an editorial board or editorial or opinion writer of a newspaper, magazine, news agency, press association or wire service; or (ii) a communication that is: (A) directed, sent or distributed by the distributing organization only to individuals who affirmatively consent to be members of the distributing organization, contribute funds to the distributing organization, or, pursuant to the distributing organization's articles or bylaws, have the right to vote directly or indirectly for the election of directors or officers, or on changes to bylaws, disposition or all or substantially all of the distributing entity's assets or the merger or dissolution of the distributing entity; or (B) for the purpose of promoting or staging any candidate debate, town hall or similar forum to which at least two candidates seeking the same office, or two proponents of differing positions on a referendum or question submitted to voters, are invited as participants, and which does not promote or advance one candidate or position over another.

**Organization affiliated with an elected official.** The term "organization affiliated with an elected official" means:

- (i) a non-profit entity other than an agency, public authority, public benefit corporation or local development corporation;
- (ii) which has received at least one donation in the previous or current calendar year; and
- (iii) over which a person holding office as mayor, comptroller, public advocate, borough president or member of the council, or an agent of such a person, which shall include an appointee of such person serving at the pleasure of such person, exercises control. There shall be a rebuttable presumption of control by an elected official where such official, or such an agent, appoints a majority of seats on the board of the entity (not including appointees nominated by another individual or entity that is not such an agent of the elected official), or is a principal officer of the entity.

In determining whether a person holding office as mayor, comptroller, public advocate, borough president or member of the council, or an agent or appointee of such a person, exercises control over such an organization, the conflicts of interest board shall consider the totality of the circumstances, including:

- (i) whether the organization was created by such an elected official or their agent, or by an individual who was previously employed by, or was a paid political consultant of, the elected official, and, if so, how recently such organization was created;
- (ii) whether the board of the organization is chaired by such an elected official or their agent;
- (iii) whether board members appointed by such elected official serve for terms or are appointed only upon nomination of other individuals or entities that are not agents of such elected official;
- (iv) the degree of involvement or direction by the elected official in such organization's policies, operations and activities; and
- (v) other such factors as the conflicts of interest board shall promulgate by rule.

Principal committees and political committees, as those terms are defined in section 3-702, are not organizations affiliated with an elected official.

**Person with business dealings with the city.** The term "person with business dealings with the city" means any person who is listed in the doing business database, or any domestic partner, spouse, or unemancipated child of such a person.

**Spend.** The term "spend" means to spend or to cause to be spent.  
(L.L. 2016/181, 12/22/2016, eff. 1/1/2018)

### **§ 3-902 Reporting and donor disclosure for organizations affiliated with elected officials.**

a. All organizations affiliated with an elected official shall report to the conflicts of interest board annually by August 1, in a manner determined by the conflicts of interest board by rule. Such report shall include:

1. the name of the organization;
2. the name or names of the elected official, or of any agent of such a person or appointee serving at the pleasure of such elected official, who is affiliated with the organization;
3. the names of the principal officers and board members of the organization;
4. whether the organization has tax-exempt status pursuant to the internal revenue code and, if so, the section of such code that grants such status;
5. the website address of the organization, if any;
6. the names of any people who such organization knows had business dealings with the city on the date of such donation, or who were added to the doing business database within 180 days after the receipt of such donation, who made a donation to the organization during the previous calendar year, if any, and the city and state of residence, dates of donation, and value of donation of any such people;
7. the names of any other individuals who, or any entity that, made a donation with a reasonable value of \$1,000 or more to the organization during the previous calendar year, if any, and the city and state of residence or state of incorporation as applicable, dates of donation, and value of donation of any such individuals or entities;
8. an accounting of the expenditures of the organization during the previous calendar year on the production or dissemination of elected official communications, in a manner and form determined by the conflicts of interest board;
9. for an organization affiliated with an elected official that did not spend or reasonably expect to spend at least 10% of their expenditures in the previous or current calendar year on elected official communications, a certification that they did not do so; and
10. any other information required to be included by the conflicts of interest board.

b. The conflicts of interest board shall maintain and regularly update a list on its website of all organizations that reported, and all donor information disclosed, to such board pursuant to this section, provided however that the conflicts of interest board may determine that disclosure of donors shall not be made public if, based upon a review of the relevant facts presented by the reporting entity, such disclosure may cause harm, threats, harassment, or reprisals to the donor, or to individuals or property affiliated with the donor. The reporting entity may appeal the board's determination in New York State supreme court pursuant to article 78 of the civil practice law and rules. The conflicts of interest board shall not post the names of donors that are the subject of such appeal pending a final judicial determination.

c. Donor written submissions received pursuant to section 3-903 shall be retained by the inquiring organization for at least three years from the date of receipt.  
(L.L. 2016/181, 12/22/2016, eff. 1/1/2019)

### **§ 3-903 Prohibition of acceptance of certain donations.**

a. Organizations affiliated with an elected official that spend or reasonably expect to spend at least 10% of their expenditures in the current or next calendar year on the production or dissemination of elected official communications shall not accept donations with a reasonable value in excess of \$400 in a single calendar year by any person who such organization knows or should know has business dealings with the city on the date of such donation. No violation shall issue and no penalty shall be imposed where any excess donation under this subdivision is refunded within 20 days of receipt by such organization.

b. Organizations affiliated with an elected official that spend or reasonably expect to spend at least 10% of their expenditures in the current or next calendar year on the production or dissemination of elected official communications shall return any donations with a reasonable value in excess of \$400 in a single calendar year by any person who is not a person who such organization knows or should know has business dealings with the city on the date of such donation, but who is added to the doing business database within 180 days of receipt by the organization. No violation shall issue and no penalty shall be imposed where any excess donation under this subdivision is refunded within 200 days of receipt by such organization.

c. Organizations affiliated with an elected official that spend or reasonably expect to spend at least 10% of their expenditures in the current or next calendar year on the production or dissemination of elected

official communications shall not accept donations by any entity or person other than a natural person, or from any person who fails to make the written submission required by subdivision d of this section.

d. Organizations affiliated with an elected official that spend or reasonably expect to spend at least 10% of their expenditures in the current or next calendar year on the production or dissemination of elected official communications shall require a written submission in a manner and form determined by the conflicts of interest board from every individual making a donation with a reasonable value in excess of \$400 in a single calendar year to determine whether such individual is a person with business dealings with the city.

e. Entities that have, as their sole purpose, advocating for New York city as the location for a national or international sporting event, a national political convention, or another event publicly determined by the conflicts of interest board to be similar to such an event are not subject to the requirements or limitations of this section.

(L.L. 2016/181, 12/22/2016, eff. 1/1/2018)

### **§ 3-904 Advisory opinions, outreach and determination of control.**

a. The conflicts of interest board shall render advisory opinions with respect to all matters covered by this chapter. An advisory opinion shall be rendered on the request of a person holding office as mayor, comptroller, public advocate, borough president or member of the council, an agent of such officeholder, or any non-profit entity potentially subject to the provisions of this chapter, and shall apply only to the particular circumstances of such request. The request shall be in such form as the board may require and shall be signed by the person making the request, or, in the case of a request by a non-profit entity, by a responsible officer or other representative of such entity. The opinion of the board shall be based on such facts as are presented in the request or subsequently submitted in a written, signed document. Notwithstanding any inconsistent provision of law, opinions rendered by the board pursuant to this section shall be made publicly available.

b. Within thirty days of a person taking office for the first time as mayor, comptroller, public advocate, borough president or member of the council, the conflicts of interest board shall notify each such elected official in writing of the obligations of organizations affiliated with such elected official set forth in this chapter.

c. In addition to the advisory opinion process set forth in subdivision a, the conflicts of interest board shall promulgate rules establishing procedures whereby a non-profit entity may apply for a formal determination that an elected official or an agent of an elected official does not exercise control over such entity, consistent with the considerations included in the definition of "organization affiliated with an elected official" set forth in section 3-901, and may seek to rebut the presumption contained in such definition. To the extent practicable, the board shall make a determination within 60 days of receiving a complete application. The entity may appeal the board's determination in New York State supreme court pursuant to article 78 of the civil practice law and rules. Where the board has determined that the entity is not controlled by an elected official, such entity shall be exempt from the provisions of this chapter for so long as there is no material change in the circumstances set forth in the application for a formal determination made pursuant to this subdivision.

(L.L. 2016/181, 12/22/2016, eff. 1/1/2018)

### **§ 3-905 Enforcement.**

Complaints alleging violations of this chapter, or of rules or directives promulgated by the conflicts of interest board pursuant to this chapter, shall be made, received, investigated and adjudicated in a manner consistent with the procedures relating to investigations and adjudications of allegations of conflicts of interest set forth in chapters 34 and 68 of the charter.

(L.L. 2016/181, 12/22/2016, eff. 1/1/2018)

### **§ 3-906 Penalties.**

a. Any organization that violates any provision of section 3-902 shall be subject to a civil penalty of not more than \$10,000. The conflicts of interest board may hold the person holding office as mayor, comptroller, public advocate or borough president with whom such organization is affiliated, if any, or their agent who violates such subdivision, jointly and severally liable for any such penalties if such person knew or reasonably should have known of the violation. The conflicts of interest board may recommend to the council that the person holding office as member of the council with whom such organization is affiliated, if

any, or their agent who violates such subdivision be held jointly and severally liable for any such penalties if such person knew or reasonably should have known of the violation. In addition to such civil penalties, for the second and subsequent offense any person who knowingly and willfully violates any provision of section 3-902 shall be guilty of a class A misdemeanor.

b. Any organization that violates subdivision a, b or c of section 3-903 shall be required to return any donations with a reasonable value in excess of the applicable donation limit, and shall be subject to a civil penalty, which for the first offense shall be not more than \$5,000, for the second offense not more than \$15,000, and for the third and subsequent offenses not more than \$30,000. The conflicts of interest board may hold the person holding office as mayor, comptroller, public advocate or borough president with whom such organization is affiliated, if any, or their agent who violates any such subdivision, jointly and severally liable for any such penalties, if such person knew or reasonably should have known of the violation. The conflicts of interest board may recommend to the council that the person holding office as member of the council with whom such organization is affiliated, if any, or their agent who violates any such subdivision, be held jointly and severally liable for any such penalties, if such person knew or reasonably should have known of the violation.

c. Any organization that violates subdivision d of section 3-903 shall be subject to a civil penalty, which for the first offense shall be not more than \$1,000, and for the second and subsequent offenses not more than \$10,000.

(L.L. 2016/181, 12/22/2016, eff. 1/1/2018\*)

*\* Editor's note: Pursuant to § 4 of L.L. 2016/181, subsection a is effective 1/1/2019.*

### **§ 3-907 Rulemaking.**

The conflicts of interest board shall promulgate such rules as are necessary to ensure the implementation of this chapter.

(L.L. 2016/181, 12/22/2016, eff. 1/1/2018)



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**New York City Conflicts of Interest Board**

**Notice of Public Hearing and Opportunity to Comment on Proposed Rule Regarding Official Fundraising**

**What are we proposing?** The Conflicts of Interest Board proposes to amend its rules to codify the circumstances by which public servants may use City time, City resources, and their City positions to fundraise to benefit the City or not-for-profit organizations.

**When and where is the hearing?** The Conflicts of Interest Board will hold a public hearing on the proposed rule. The public hearing will take place at [time] on [date]. The hearing will be at [location].

This location has the following accessibility option(s) available: [            ]

**How do I comment on the proposed rules?** Anyone can comment on the proposed rules by:

- **Website.** You can submit comments to the Conflicts of Interest Board through the NYC rules website at <http://rules.cityofnewyork.us>.
- **Email.** You can email comments to [rules@coib.nyc.gov](mailto:rules@coib.nyc.gov).
- **Mail.** You can mail comments to Christopher M. Hammer, Deputy General Counsel, Conflicts of Interest Board, 2 Lafayette Street, Suite 1010, New York, New York 10007.
- **Fax.** You can fax comments to the Conflicts of Interest Board at (212) 437-0705.
- **By speaking at the hearing.** Anyone who wants to comment on the proposed rule at the public hearing must sign up to speak. You can sign up before the hearing by calling (212) 437-0730. You can also sign up in the hearing room before the hearing begins on [date]. You can speak for up to three minutes.

**Is there a deadline to submit comments?** Yes; you must submit written comments by [date].

**Do you need assistance to participate in the hearing?** You must tell the Conflicts of Interest Board if you need a reasonable accommodation of a disability at the hearing. You must tell us if you need a sign language interpreter. You can tell us by mail at the address given above. You may also tell us by telephone at (212) 437-0730. You must tell us by [date].

**Can I review the comments made on the proposed rules?** You can review the comments made online on the proposed rules by going to the website at <http://rules.cityofnewyork.us/>. A few days after the hearing, copies of all comments submitted online, copies of all written comments, and a summary of oral comments concerning the proposed rule will be available to

1 the public at the Conflicts of Interest Board, 2 Lafayette Street, Suite 1010, New York, New  
2 York 10007.

3  
4 **What authorizes the Conflicts of Interest Board to make this rule?** Sections 1043, 2603(a),  
5 and 2606(d) of the City Charter authorize the Conflicts of Interest Board to make this proposed  
6 rule. This proposed rule was not included in the Conflicts of Interest Board's regulatory agenda  
7 for this Fiscal Year because it was not contemplated when the Conflicts of Interest Board  
8 published the agenda.

9  
10 **Where can I find the Conflicts of Interest Board's rules?** The Conflicts of Interest Board's  
11 rules are in Title 53 of the Rules of the City of New York.

12  
13 **What rules govern the rulemaking process?** The Conflicts of Interest Board must meet the  
14 requirements of Section 1043 of the City Charter when creating or changing rules. This notice is  
15 made according to the requirements of Section 1043 of the City Charter.

16  
17 **Statement of Basis and Purpose of the Proposed Rule**

18  
19 The proposed rule reflects and reaffirms a principle the Board has long held: the City  
20 benefits from private donations to City agencies or to not-for-profit organizations serving the  
21 City. The Board seeks to encourage this philanthropy because it is beneficial to the City and its  
22 residents, particularly at times when City government faces budget challenges that affect its  
23 ability to provide programs and services to its residents. Thus, when public servants request the  
24 Board's advice regarding whether Chapter 68 permits them to solicit contributions from private  
25 donors, the Board has consistently recognized the City purpose in a public servant using City  
26 time, City resources, and his or her City position to solicit contributions for programs and  
27 services that benefit New Yorkers.

28 This City purpose must, however, be weighed against the potentially coercive effect of a  
29 public servant's solicitations, as well as any private interests that a public servant may have in  
30 making such solicitations. Setting this balance is essential to the Board's mission, articulated in  
31 Charter § 2600, "to preserve the trust placed in the public servants of the city, to promote public

1 confidence in government, to protect the integrity of government decision-making and to  
2 enhance government efficiency.”

3 The proposed rule represents the synthesis of decades of advice the Board has provided to  
4 public servants regarding the solicitation of donations to fund programs and services of City  
5 government or of not-for-profit organizations that serve New Yorkers. The Board’s numerous  
6 advisory opinions on this topic include Advisory Opinion Nos. 1991-10, 1992-15, 1992-21,  
7 1992-27, 1993-15, 1993-26, 1994-29, 1995-5, 1995-7, 1995-27, 1998-14, 2003-4, and 2008-6.  
8 Most notably among these prior advisory opinions, the Board in Advisory Opinion No. 2003-4  
9 articulated a comprehensive framework to permit a City agency’s employees to solicit funds for  
10 the City and for not-for-profit organizations closely affiliated with the agency.

11 Since then, the New York City Council enacted Local Law No. 181 of 2016, codified in  
12 Chapter 9 of Title 3 of the New York City Administrative Code (“Chapter 9”). Among other  
13 things, Chapter 9 requires a not-for-profit organization affiliated with elected officials, either  
14 directly or through their agents (such as commissioners of City agencies with respect to the  
15 Mayor), to report certain of its donations to the Board on an annual basis.

16 The proposed rule interprets the “catch-all” provision of Charter § 2604(b)(2), which  
17 states that “[n]o public servant shall engage in any business, transaction, or private employment,  
18 or have any financial or other private interest, direct or indirect, which is in conflict with the  
19 proper discharge of his or her official duties.” This provision was included by the drafters of the  
20 comprehensively amended Chapter 68 “in recognition of the fact that the specific prohibitions set  
21 forth in [Chapter 68] cannot address all conflict of interest situations which may arise in the  
22 future and that the [Conflicts of Interest] Board must retain the flexibility to handle new

1 situations as they arise.” Volume II, Report of the New York City Charter Revision  
2 Commission, December 1986 – November 1988, at 175.

3 The proposed rule would codify the conditions under which a public servant may solicit  
4 donations. Specifically, it would identify: (1) the entities for which a public servant may solicit  
5 donations; (2) the persons or entities from whom a public servant may solicit donations; (3) the  
6 disclaimer a public servant must make in connection with the solicitation; and (4) the disclosures  
7 a City agency must make about its fundraising activities.

8 **1) For Whom a Public Servant May Solicit Donations**

9 Paragraph (a)(1) would identify potential beneficiaries of a public servant’s solicitations.  
10 Because “[i]t is of course clear that the City itself is a permissible beneficiary,” A.O. No. 2003-4  
11 at 2, a public servant could solicit donations for his or her City agency or office, as well as for  
12 any other City agency or office the public servant’s agency head designates after obtaining the  
13 written approval of the head of the other agency or office. Some not-for-profit organizations are  
14 closely affiliated with an agency or office by virtue of an agency head exercising control over the  
15 organization as part of his or her City position. These organizations, which include entities such  
16 as the Fund for Public Schools (affiliated with the New York City Department of Education) and  
17 the Fund for Public Health in New York City (affiliated with the New York City Department of  
18 Health and Mental Hygiene), are regulated by Chapter 9 precisely because they are affiliated  
19 with elected officials or their agents. Thus, the proposed rule would recognize that, where an  
20 agency head exercises control over an organization subject to Chapter 9 as part of his or her City  
21 job, fundraising for the organization by that office or agency’s employees may occur as if such  
22 fundraising were for the City itself.

1 Finally, a public servant may solicit donations for the benefit of any other not-for-profit  
2 organization designated by the public servant's agency head pursuant to paragraph (b), that is,  
3 not-for-profit organizations that have a clear and direct nexus with the City and its residents and  
4 with the mission or duties of the City agency or office. As the Board has previously observed in  
5 Advisory Opinion No. 2008-6 in the context of solicitations for unaffiliated not-for-profit  
6 organizations, an arts organization in California or an affordable housing provider in Buffalo  
7 would not be permissible beneficiaries pursuant to paragraph (b). See A.O. No. 2008-6 at 7.  
8 Similarly, a not-for-profit organization dedicated to increasing affordable housing in the City  
9 might well be an appropriate beneficiary of fundraising by some agencies, such as the New York  
10 City Department of Housing Preservation and Development, but not by other agencies, such as  
11 the New York City Department of Cultural Affairs. Id.

12 Subparagraph (a)(1)(iv) and subdivision (b) would reflect the prohibition set forth in  
13 Charter § 2604(b)(3) that a public servant may not "shall use or attempt to use his or her position  
14 as a public servant to obtain any financial gain, contract, license, privilege or other private or  
15 personal advantage, direct or indirect, for the public servant or any person or firm associated  
16 with the public servant." Thus, paragraph (b) would state that an agency head may not designate  
17 an organization as an appropriate beneficiary of agency solicitations if the agency head is  
18 "associated," within the meaning of Charter § 2601(5), with the organization or an employee of  
19 the organization. Similarly, even if a public servant's agency head has designated an  
20 organization as the appropriate beneficiary of agency solicitations, subparagraph (a)(1)(iv) would  
21 provide that a public servant could not solicit donations to that organization if the public servant  
22 is associated, within the meaning of Charter § 2601(5), with the organization or an employee of  
23 the organization.

1           **2) From Whom a Public Servant May Solicit Donations**

2           Paragraph (a)(2) would permit a public servant to solicit donations when such  
3 solicitations are directed to the general public, such as in a public service advertisement, a  
4 speech, a flyer, a robo-call, or a mass mailing. As the Board has previously observed, when  
5 solicitations are directed to the general public, “there is less danger that any particular person or  
6 entity will receive, or be perceived to receive, preferential treatment as a result of a donation,”  
7 and “since [the solicitation] is not directed at any particular individual or entity, the danger of  
8 coercion is virtually nil.” A.O. No. 2003-4 at 17-18. Indeed, paragraph (a)(2) recognizes that  
9 this slight risk of coercion “is outweighed by the public benefit derived from permitting such  
10 solicitations.” Id. at 19.

11           Solicitations directed toward a specific individual or firm—such as one-on-one phone  
12 calls, meetings, and personal letters—“are effective precisely *because* they are inherently  
13 coercive.” A.O. No. 2003-4 at 19. In recognition of this, paragraph (a)(2) would permit a public  
14 servant to direct a solicitation to an individual or firm provided that the individual or firm does  
15 not have a “particular matter” pending before the public servant, as defined in Charter §  
16 2601(17). By prohibiting solicitations to those individuals who or firms that have a particular  
17 matter pending before the soliciting public servant, the proposed rule would balance the benefit  
18 to the City of the solicitations while “minimiz[ing] the likelihood of coercion and the appearance  
19 that the donor may receive inappropriate access or other preferential treatment as a result of the  
20 donation.” A.O. No. 2003-4 at 20. This prohibition on solicitations would be limited to the  
21 soliciting official; thus, an agency could erect firewalls that prevent a soliciting official from  
22 having any involvement in making, affecting, or directing the particular matter.

23           **3) What Disclaimer a Public Servant Must Make in Connection with the Solicitation**

1 Paragraph (a)(3) would require a public servant to accompany any solicitation with a  
2 disclaimer that a contribution will not affect the disposition of any business dealings with the  
3 City or provide special access to City officials. This requirement would mitigate the likelihood  
4 of coercion and the appearance that a donor may receive preferential treatment.

#### 5 **4) What Disclosures a City Agency Must Make about its Fundraising Activities**

6 Subdivision (c) would codify reporting requirements for an agency's fundraising  
7 activities, which would provide an additional safeguard to ensure that City agencies' fundraising  
8 activities are legally compliant. The agency head would be required to report information to the  
9 Board regarding donations of \$5,000 or more received by the agency during the previous  
10 calendar year, as well as the name of any not-for-profit organization, designated pursuant to  
11 paragraph (b), for which agency employees solicited donations.

12 A City agency would be required to report donations of \$5,000 or more the agency  
13 received. In selecting this threshold, the Board would be codifying the threshold articulated in  
14 A.O. No. 2003-4. As with the disclosures required by Chapter 9, the agency's disclosures would  
15 be made publicly available by the Board. The deadline for reporting donations received during  
16 the previous calendar year would be February 28, the same deadline for agencies to report to the  
17 Board, pursuant to Board Rules § 1-02(a)(2), the titles and names of public servants who have  
18 substantial policy discretion. Because subdivision (c) would make this reporting a requirement  
19 of Charter § 2604(b)(2), non-compliance would be a violation punishable by fine, pursuant to  
20 Charter § 2606(d).

21 Subdivision (d) would permit an agency head to make a written request to the Board that  
22 disclosure of a donor's name and/or amount of donation not be made public and would permit  
23 the Board, in response to such a request or on its own initiative, to determine that disclosure of a

1 donor's name and/or amount of donation not be made public. The standard for such privacy  
2 determinations is the same standard the Board adopted in implementing Chapter 9. See Board  
3 Rules § 3-04(c). The deadline for an agency head to make a written request pursuant to  
4 subdivision (d) would be January 31, midway between the end of the reporting year (December  
5 31) and the deadline for reporting donations (February 28).

6

7 **Text of the Proposed Rule**

8

9 New material is underlined.

10 [Deleted material is in brackets.]

11

12 Section 1. Section 1-14 of Title 53 of the Rules of the City of New York is amended to read as

13 follows:

14 § 1-14 [Reserved.] Official Fundraising.

15 (a) For purposes of Charter § 2604(b)(2) and Charter § 2604(b)(3), a public servant may use his

16 or her position as a public servant to solicit a donation provided that all of the following

17 conditions are met:

18 (1) The solicitation seeks a donation for one of the following:

19 (i) the City agency or office served by the public servant;

20 (ii) another City agency or office designated by the public servant's agency head,

21 with the written approval of the head of the other agency or office;

22 (iii) a not-for-profit organization subject to Chapter 9 of Title 3 of the Administrative

23 Code over which the public servant's agency head exercises control as part of his

24 or her City position; or



1           (iv) a not-for-profit organization designated by the public servant's agency head  
2           pursuant to subdivision (b) of this section, provided that the public servant is not  
3           associated, within the meaning of Charter Section 2601(5), with the organization  
4           or an employee of the organization.

5           (2) The solicitation is directed either to the general public or to an individual or firm that  
6           does not have a particular matter pending before the public servant.

7           (3) The solicitation is accompanied by a disclaimer that a contribution will not affect any  
8           business dealings with the City or provide special access to City officials.

9           (b) An agency head may designate in writing one or more not-for-profit organizations for  
10           solicitations made by agency or office employees pursuant to subdivision (a) of this section,  
11           provided that both of the following conditions are met:

12           (1) the not-for-profit organization has a clear and direct nexus to the City and its residents  
13           and with the mission or duties of the City agency or office; and

14           (2) the agency head is not associated, within the meaning of Charter Section 2601(5), with  
15           the organization or an employee of the organization.

16           (c) Pursuant to Charter § 2604(b)(2), each agency head must report to the Board annually by  
17           February 28:

18           (1) the name of any individual or firm that made one or more donations totaling \$5,000 or  
19           more to the agency during the previous calendar year, the total amount of these  
20           donations, and whether the donation was cash or an in-kind donation; and

21           (2) the name of any not-for-profit organization designated by the agency head pursuant to  
22           subdivision (b) of this section for which agency employees solicited donations during the  
23           previous calendar year.

- 1 (d) An agency head may submit to the Board a written request that disclosure, pursuant to  
2 subdivision (c)(1) of this section, of one or more of its donors and/or the amount of donation  
3 not be made public. The written request must be submitted no later than January 31 for the  
4 previous calendar year and must explain why the release of such information to the public  
5 may cause harm, threats, harassment, or reprisals to the donor or to individuals or property  
6 affiliated with the donor. Whether or not an agency head has submitted a request pursuant to  
7 this subdivision, the Board may on its own initiative grant privacy as to any information  
8 submitted by an agency head, upon a finding by the Board that the release of such  
9 information would pose a risk to the safety or security of any person.
- 10 (e) For purposes of this section, an elected official, including a District Attorney, is the agency  
11 head of the staff members in his or her office. The Speaker of the New York City Council is  
12 the agency head of the central staff of Council, and a Council Member is the agency head of  
13 the staff of his or her office.

1 § 1-14 Official Fundraising

2  
3 (a) For purposes of Charter § 2604(b)(2) and Charter § 2604(b)(3), a public servant may use his  
4 or her position as a public servant to solicit a donation provided that all of the following  
5 conditions are met:

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7 (1) The solicitation seeks a donation for one of the following:

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9 (i) the City agency or office served by the public servant;
- 10  
11 (ii) another City agency or office designated by the public servant's agency head,  
12 with the written approval of the head of the other agency or office;
- 13  
14 (iii) a not-for-profit organization subject to Chapter 9 of Title 3 of the Administrative  
15 Code over which the public servant's agency head exercises control as part of his  
16 or her City position; or
- 17  
18 (iv) a not-for-profit organization designated by the public servant's agency head  
19 pursuant to subdivision (b) of this section, provided that the public servant is not  
20 associated, within the meaning of Charter Section 2601(5), with the organization  
21 or an employee of the organization.

22  
23 (2) The solicitation is directed either to the general public or to an individual or firm that  
24 does not have a particular matter pending before the public servant.

25  
26 (3) The solicitation is accompanied by a disclaimer that a contribution will not affect any  
27 business dealings with the City or provide special access to City officials.

28  
29 (b) An agency head may designate in writing one or more not-for-profit organizations for  
30 solicitations made by agency or office employees pursuant to subdivision (a) of this section,  
31 provided that both of the following conditions are met:

- 32  
33 (1) the not-for-profit organization has a clear and direct nexus to the City and its residents  
34 and with the mission or duties of the City agency or office; and
- 35  
36 (2) the agency head is not associated, within the meaning of Charter Section 2601(5), with  
37 the organization or an employee of the organization.

38  
39 (c) Pursuant to Charter § 2604(b)(2), each agency head must report to the Board annually by  
40 February 28:

- 41  
42 (1) the name of any individual or firm that made one or more donations totaling \$5,000 or  
43 more to the agency during the previous calendar year, the total amount of these  
44 donations, and whether the donation was cash or an in-kind donation; and

1 (2) the name of any not-for-profit organization designated by the agency head pursuant to  
2 subdivision (b) of this section for which agency employees solicited donations during the  
3 previous calendar year.  
4

5 (d) An agency head may submit to the Board a written request that disclosure, pursuant to  
6 subdivision (c)(1) of this section, of one or more of its donors and/or the amount of donation  
7 not be made public. The written request must be submitted no later than January 31 for the  
8 previous calendar year and must explain why the release of such information to the public  
9 may cause harm, threats, harassment, or reprisals to the donor or to individuals or property  
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11 this subdivision, the Board may on its own initiative grant privacy as to any information  
12 submitted by an agency head, upon a finding by the Board that the release of such  
13 information would pose a risk to the safety or security of any person.  
14

15 (e) For purposes of this section, an elected official, including a District Attorney, is the agency  
16 head of the staff members in his or her office. The Speaker of the New York City Council is  
17 the agency head of the central staff of Council, and a Council Member is the agency head of  
18 the staff of his or her office.  
19