

August 24, 2023 – Open Meeting Matter

To: The Board

From: Clare Wiseman
Ethan A. Carrier

Date: August 15, 2023

Re: Proposed Board Rules § 1-02:
Public Servants Charged with Substantial Policy Discretion

Chapter 68 contains several restrictions on public servants engaging in political activities, two of which, Charter §§ 2604(b)(12) and 2604(b)(15), apply to public servants “charged with substantial policy discretion as defined by rule of the board.”¹ In 1990 the Board promulgated Board Rules § 1-02 to define which public servants are “charged with substantial policy discretion” (also known as “policymakers”) and to establish requirements for reporting those designations to the Board and the public and for notification of the individual public servants who are designated as policymakers. Since its adoption in 1990, the Board has amended Board Rules § 1-02 four times to refine the definition of policymakers and better balance the need for timely identification, public

¹ Charter § 2604(b)(12) states: “No public servant, other than an elected official, who is a deputy mayor, or head of an agency or who is charged with substantial policy discretion as defined by rule of the board, shall directly or indirectly request any person to make or pay any political assessment, subscription or contribution for any candidate for an elective office of the city or for any elected official who is a candidate for any elective office; provided that nothing contained in this paragraph shall be construed to prohibit such public servant from speaking on behalf of any such candidate or elected official at an occasion where a request for a political assessment, subscription or contribution may be made by others.”

Charter § 2604(b)(15) states: “No elected official, deputy mayor, deputy to a citywide or boroughwide elected official, head of an agency, or other public servant who is charged with substantial policy discretion as defined by rule of the board may be a member of the national or state committee of a political party, serve as an assembly district leader of a political party or serve as the chair or as an officer of the county committee or county executive committee of a political party, except that a member of the council may serve as an assembly district leader or hold any lesser political office as defined by rule of the board.”

reporting, and notice to individual public servants against the administrative burden of these reporting and notification requirements on City agencies. Current Board Rules § 1-02 is attached as **Exhibit 1**.

This proposed rule amendment continues these efforts in four ways: First, by improving the policymaker definition as it applies to very large City agencies; second, by changing the date by which City agencies must report their lists of policymakers to the Board and making that reporting semi-annual rather than annual; third, by establishing a formal process by which a City agency may dispute the Board's determination of whether a public servant is or is not a policymaker; and, fourth, by codifying the Board's current practice of directly notifying policymakers of their additional restrictions rather than requiring City agencies to do so.

Definition of Public Servants Charged with Substantial Policy Discretion

The core of the policymaker definition has remained almost unchanged since its adoption in 1990. Specifically, since its inception the rule has stated that “a public servant is deemed to have substantial policy discretion if he or she has major responsibilities and exercises independent judgment in connection with determining important agency matters.” The original 1990 rule then goes on to state that policymakers “include, but are not limited to, agency heads, deputy agency heads, assistant agency heads and public servants in charge of any major office, division, bureau or unit of an agency.” The current rule includes additions to that list of “members of boards and commissions” (1997 amendment) “other than community boards” (2019 amendment).

The proposed amendment seeks to improve this definition as it applies to very large City agencies. These very large City agencies, namely the New York City Police Department, New York City Health + Hospitals, and the New York City Department of Education, have routinely identified too few public servants as being charged with substantial policy discretion. This under-designation appears to be a result of not including the heads of large offices or units that often are, by themselves, larger than many small City agencies.

To address this issue, Staff proposes the Board amend Board Rules § 1-02 to establish a baseline for City agencies with 25,000 or more employees such that all public servants in the top four levels of management at these very large agencies will be policymakers. There may be additional public servants at these very large agencies outside of the top four levels of management who are also policymakers pursuant to the definition in the rule; the establishment of this baseline will make it easier to individually designate these additional public servants based on their specific responsibilities.

Reporting Requirement

When originally promulgated in 1990, Board Rules § 1-02 required that City agencies annually report lists of policymaking positions to the Board, notify these policymakers, and update the Board of any changes within thirty days. The Board amended the rule in 1997 to eliminate the thirty-day update requirement, leaving only the annual reporting and notification requirements. The 1997 amendment reflects the Board's conclusion that this regular updating of policymaker lists is overly burdensome to City agencies and the Board. However, the current structure of annual reporting and

notification has proven to be too infrequent. A public servant who starts a policymaking position shortly after the annual reporting and notification date might go nearly a year before being identified as a policymaker and notified of the additional political activities restrictions to which they are subject. Thus, proposed Board Rules § 1-02(b) would add a second reporting date for policymakers, such that the delay in identifying and notifying a policymaker of their additional Charter restrictions would never be more than six months. This interval better balances the administrative burden against the need for transparency and notification.²

Procedure for City Agencies to Seek Reconsideration of Board Determinations

In its 1997 amendments to Board Rules § 1-02, the Board codified its authority to determine that a public servant was or was not a policymaker and that a City agency would be obligated to adjust its list of policymakers at the Board's direction. Missing from the rule has been a procedure for City agencies to seek the Board's reconsideration of such a determination. Proposed Board Rules § 1-02(b) adds such a mechanism.

Notification Requirement and Public Inspection of Policymaker Lists

Board Rules § 1-02 requires that City agencies notify their policymakers of the additional political activities restrictions to which they are subject, but the Board has found instances where City agencies have not fulfilled this notification obligation. As a result, since 2021, Board Staff have assumed this administrative responsibility by notifying

² City Administrative Code § 12-110(b)(3)(a) requires policymakers to file annual disclosure reports with the Board. The proposed rule amendment sets the first date for semi-annual agency reporting of policymaker lists slightly earlier in the year than the current annual reporting date to better coordinate with the administrative functions of the annual disclosure process.

policymakers directly rather than relying on City agencies to do so. Similarly, while Board Rules § 1-02 provides that City agencies “may make available for public inspection” their lists of policymakers, the Board routinely posts these lists on its website to provide a centralized public source for this information. Proposed Board Rules §§ 1-02(b)(2) and 1-02(c) codify these established practices.

Conclusion

Proposed Board Rules § 1-02 is attached as **Exhibit 2**. The Draft Notice of Public Hearing and Opportunity to Comment including the Statement of Basis and Purposes is attached as **Exhibit 3**. With the Board’s approval, Staff will formally submit the proposed Board Rules to the New York City Law Department and the Mayor’s Office of Operations for review and approval as required by the City Administrative Procedure Act. See Charter § 1043(d).

Current Board Rules § 1-02:
Public Servants Charged with Substantial Policy Discretion.

- (a) For purposes of Charter § 2604(b)(12) and § 2604(b)(15), a public servant is deemed to have substantial policy discretion if he or she has major responsibilities and exercises independent judgment in connection with determining important agency matters. Public servants with substantial policy discretion include, but are not limited to: agency heads, deputy agency heads, assistant agency heads, public servants in charge of any major office, division, bureau, or unit of an agency, and members of boards and commissions other than community boards. Agency heads shall:
- (1) designate by title, or position, and name the public servants in their agencies who have substantial policy discretion as defined by this section;
 - (2) file annually with the Conflicts of Interest Board, no later than February 28 of each year, a list of such titles or positions and the names of the public servants holding them; and
 - (3) notify these public servants in writing of the restrictions set forth in Charter § 2604(b)(12) and § 2604(b)(15) to which they are subject. If the Conflicts of Interest Board determines that the title, position, or name of any public servant should be added to or deleted from the list supplied by an agency, the Board shall notify the head of the agency involved of that addition or deletion; the agency shall in turn promptly notify the affected public servant of the change.
- (b) Each agency may make available for public inspection a copy of the most recent list filed by the agency, with any additions or deletions made by the Board pursuant to subdivision (a) of this section.

Proposed Board Rules § 1-02:
Public Servants Charged with Substantial Policy Discretion.

- (a) Definition. For purposes of City Charter §§ 2604(b)(12) and 2604(b)(15), and City Administrative Code § 12-110, a public servant charged with substantial policy discretion includes:
- (1) public servants with major responsibilities and who exercise independent judgment in connection with determining important agency matters;
 - (2) agency heads, deputy agency heads, assistant agency heads, and public servants in charge of any major office, division, bureau, or unit of an agency;
 - (3) for City agencies employing 25,000 or more public servants, public servants who are in the top four levels of management, with the first level of management being the agency head; and
 - (4) members of boards and commissions other than community boards.
- (b) Reporting. By February 7 and August 7 each year, agency heads must provide to the Board a list of the public servants at their agencies charged with substantial policy discretion. The list must include a current agency organizational chart and the name; office title; agency office, division, or unit; and email address of each public servant charged with substantial policy discretion.
- (1) If the Board determines that a public servant should be added to or removed from this list, the Board shall notify the agency head of that determination. Within 30 days of receipt of the Board determination, an agency head may submit to the Board a written request for reconsideration of the Board's determination.
 - (2) Within 30 days of receipt of an agency's list, the Board will post on its website the name; office title; agency; and office, division, or unit of those public servants charged with substantial policy discretion.
- (c) Notification. Within 30 days of receipt of an agency's list, the Board will notify in writing those public servants charged with substantial policy discretion that they are subject to the restrictions set forth in Charter § 2604(b)(12) and § 2604(b)(15).

1 **New York City Conflicts of Interest Board**

2
3 **Notice of Public Hearing and Opportunity to Comment on Proposed Rules**
4 **Regarding Public Servants Charged with Substantial Policy Discretion**
5

6 **What are we proposing?** The Conflicts of Interest Board is proposing to amend its rule
7 concerning the definition of “substantial policy discretion” as used in City Charter
8 §§ 2604(b)(12) and 2604(b)(15) and City Administrative Code § 12-110. The Board is
9 further proposing to repeal Section 4-03 of Chapter 4 of Title 53 of the Rules of the City
10 of New York.

11
12 **When and where is the Hearing?** The Conflicts of Interest Board will hold a public
13 hearing on the proposed rule. The public hearing will take place at [time] on [date]. The
14 hearing will be at [TBD].

15
16 This location has the following accessibility option(s) available: [TBD]

17
18 **How do I comment on the proposed rules?** Anyone can comment on the proposed
19 rules by:

- 20
21 • **Website.** You can submit comments to the Conflicts of Interest Board through the
22 NYC rules website at <http://rules.cityofnewyork.us>.
23
24 • **Email.** You can email comments to Rules@COIB.nyc.gov.
25
26 • **By Speaking at the Hearing.** Anyone who wants to comment on the proposed
27 rule at the public hearing may speak for up to three minutes. It is recommended,
28 but not required, that commenters sign up prior to the hearing by contacting the
29 Conflicts of Interest Board by telephone at (212) 437-xxxx or by email at [TBD].
30 You can also sign up in the hearing room before the hearing begins on [date].
31

32 **Is there a deadline to submit comments?** Yes, you must submit written comments by
33 [date].
34

35 **Do you need assistance to participate in the hearing?** You must tell the Conflicts of
36 Interest Board if you need a reasonable accommodation of a disability at the hearing,
37 including if you need a sign language interpreter. You can advise us by telephone at (212)
38 437-xxxx or by email at [TBD]. You must tell us by [date].
39

40 **Can I review the comments made on the proposed rules?** You can review the
41 comments made online on the proposed rules by going to the website at
42 <http://rules.cityofnewyork.us/>. Copies of all comments submitted online, copies of all
43 written comments, and a summary of oral comments concerning the proposed rule will
44 be available to the public on the Conflicts of Interest Board’s website
45 ([https://www1.nyc.gov/site/coib/public-documents/open-meetings-and-public-](https://www1.nyc.gov/site/coib/public-documents/open-meetings-and-public-hearings.page)
46 [hearings.page](https://www1.nyc.gov/site/coib/public-documents/open-meetings-and-public-hearings.page)) as soon as practicable.

1
2 **What authorizes the Conflicts of Interest Board to make this rule?** Sections 1043,
3 2603(a), 2603(d), 2604(b)(12), and 2604(b)(15) of the City Charter authorize the Conflicts
4 of Interest Board to make this proposed rule. These rules were included in the Conflicts
5 of Interest Board’s regulatory agenda for this Fiscal Year.

6
7 **Where can I find the Conflicts of Interest Board’s rules?** The Conflicts of Interest
8 Board’s rules are in Title 53 of the Rules of the City of New York.

9
10 **What rules govern the rulemaking process?** The Conflicts of Interest Board must meet
11 the requirements of Section 1043 of the City Charter when creating or changing rules.
12 This notice is made according to the requirements of Section 1043 of the City Charter.

13 **STATEMENT OF BASIS AND PURPOSE**

14 Board Rules § 1-02 defines which public servants are charged with “substantial
15 policy discretion” (also known as “policymakers”) for the purposes of City Charter
16 § 2604(b)(12), which prohibits policymakers from engaging in fundraising for the
17 campaigns of City elected officials or candidates for City elected offices; City Charter
18 § 2604(b)(15), which prohibits policymakers from holding certain political party positions;
19 and City Administrative Code § 12-110(b)(3)(a), which requires policymakers to file an
20 annual disclosure report with the Conflicts of Interest Board (the “Board”). Board Rules
21 § 1-02 requires each City agency to make its list of policymakers available to the public,
22 to report that list annually to the Board, and to notify policymakers of the additional
23 restrictions on their political activities found in City Charter §§ 2604(b)(12) and
24 2604(b)(15).

25 The Board proposes to amend Board Rules § 1-02 for four purposes: first, to
26 provide additional guidance to very large City agencies as to which public servants are
27 policymakers; second, to change the date by which City agencies must report their lists
28 of policymakers to the Board and to add a second reporting date; third, to establish a
29 mechanism by which an agency head can dispute a Board determination to add or

1 remove a policymaker from that agency's list; and, fourth, to codify the current practice
2 that the Board, and not City agencies, notifies policymakers of the additional restrictions
3 on their political activities.

4 The Board has found that the definition of public servants with substantial policy
5 discretion in existing Board Rules § 1-02(a) provides insufficient guidance to very large
6 City agencies, resulting in under-inclusion on their policymakers lists. This under-inclusion
7 is due to very large agencies failing to identify the heads of offices or units that are, by
8 themselves, larger than many small City agencies. Accordingly, proposed Board Rules §
9 1-02(a) would determine the top four levels of management at these very large agencies,
10 those with 25,000 or more employees, are charged with substantial policy discretion. This
11 blanket determination is not intended to limit who is a policymaker at such agencies, as
12 other public servants at these very large agencies who are not in the top four levels of
13 management may also meet the criteria for policymakers set forth in Board Rules § 1-
14 02(a)(1).

15 In proposed Board Rules § 1-02(b), the Board would move the deadline for City
16 agencies to provide their policymakers lists to the Board each year from February 28 to
17 February 7 to coordinate with the administrative need for agencies to identify their
18 required filers in advance of the annual filing period under the Annual Disclosure Law.
19 Additionally, the Board would add a second date for City agencies to provide their lists of
20 policymakers. In 1997, the Board amended a prior version of this Rule to change the then
21 real-time reporting requirement to an annual requirement, after finding that the real-time
22 requirement was overly burdensome. The Board has found annual reporting to be too
23 infrequent, resulting in delays in the identification and notification of public servants who

1 are policymakers. Thus, the Board proposes a middle ground by requiring reporting and
2 notification semiannually. Additionally, the Board would add to proposed Board Rules
3 § 1-02(b) a mechanism by which an agency head can dispute a Board determination to
4 add or remove a policymaker from that agency's list, which is missing from existing Board
5 Rules § 1-02.

6 In proposed Board Rules § 1-02(c), the Board would codify its existing practice of
7 itself, and not City agencies, notifying policymakers of their status under the Rule; the
8 Board has assumed this obligation from City agencies to ensure that the educational
9 purpose of this requirement is fulfilled. Proposed Board Rules § 1-02(b)(2) would codify
10 the Board's current practice of making agencies' policymakers lists public by posting them
11 on the Board's website; the Board has created a centralized place for the public to obtain
12 this information.

13 Finally, the Board proposes repealing Board Rules § 4-03 because it is redundant
14 of City Administrative Code § 12-110(a)(12), and proposed Board Rules § 1-02 makes
15 clear that its definition applies for the purposes of the Annual Disclosure Law.

16 **Text of Proposed Board Rules**

17 New material is underlined.

18 [Deleted material is in brackets.]

19 Section 4-03 of Chapter 4 of Title 53 of the Rules of the City of New York is
20 REPEALED and reserved.

21 Section 1-02 of Chapter 1 of Title 53 of the Rules of the City of New York is
22 amended to read as follows:

23 **§ 1-02 Public Servants Charged with Substantial Policy Discretion.**

1 (a) Definition. For purposes of City Charter §§ 2604(b)(12) and [§] 2604(b)(15), and
2 City Administrative Code § 12-110, a public servant charged with [is deemed to
3 have] substantial policy discretion [if] includes:

4 (1) [he or she has] public servants with major responsibilities and who exercise[s]
5 independent judgment in connection with determining important agency
6 matters[.];

7 (2) [Public servants with substantial policy discretion include, but are not limited
8 to:] agency heads, deputy agency heads, assistant agency heads, and public
9 servants in charge of any major office, division, bureau, or unit of an agency[,
10 and];

11 (3) for City agencies employing 25,000 or more public servants, public servants
12 who are in the top four levels of management, with the first level of management
13 being the agency head; and

14 (4) members of boards and commissions other than community boards.

15 (b) Reporting. By February 7 and August 7 each year, agency heads must provide to
16 the Board a list of the public servants at their agencies charged with substantial
17 policy discretion. The list must include a current agency organizational chart and
18 the name; office title; agency office, division, or unit; and email address of each
19 public servant charged with substantial policy discretion.

20 (1) If the Board determines that a public servant should be added to or removed
21 from this list, the Board shall notify the agency head of that determination.

22 Within 30 days of receipt of the Board determination, an agency head may

1 submit to the Board a written request for reconsideration of the Board's
2 determination.

3 (2) Within 30 days of receipt of an agency's list, the Board will post on its website
4 the name; office title; agency; and office, division, or unit of those public
5 servants charged with substantial policy discretion.

6 (c) Notification. Within 30 days of receipt of an agency's list, the Board will notify in
7 writing those public servants charged with substantial policy discretion that they
8 are subject to the restrictions set forth in Charter § 2604(b)(12) and § 2604(b)(15).

9 [Agency heads shall:

10 (1) designate by title, or position, and name the public servants in their agencies
11 who have substantial policy discretion as defined by this section;

12 (2) file annually with the Conflicts of Interest Board, no later than February 28 of
13 each year, a list of such titles or positions and the names of the public servants
14 holding them; and

15 (3) notify these public servants in writing of the restrictions set forth in Charter
16 § 2604(b)(12) and § 2604(b)(15) to which they are subject. If the Conflicts of
17 Interest Board determines that the title, position, or name of any public servant
18 should be added to or deleted from the list supplied by an agency, the Board
19 shall notify the head of the agency involved of that addition or deletion; the
20 agency shall in turn promptly notify the affected public servant of the change.

21 (b) Each agency may make available for public inspection a copy of the most recent
22 list filed by the agency, with any additions or deletions made by the Board pursuant
23 to subdivision (a) of this section.]