

**March 12, 2019, Agenda – Open Meeting Matter**  
February 28, 2019, Agenda – Open Meeting Matter

To: Members of the Board

From: Katherine Miller

Date: March 6, 2019

Re: Proposed Amendments to Chapter 2 of the Board Rules

In response to the discussion at the February 2019 Board meeting, Staff has made the requested revisions to the text of the proposed commentary and Board Rules. Additionally, Staff has revised proposed Board Rules § 2-03(f)(1) by removing the sentence about “offers of settlement.” In making this change, Staff re-reviewed the Rules of Practice for the New York City Office of Administrative Trials and Hearings (“OATH Rules”) regarding settlement offers.<sup>1</sup> Because the OATH Rules state that all settlement offers are confidential and inadmissible at trial and that Administrative Law Judges are prohibited from testifying about admissions made at a settlement conference, Staff believes that the OATH Rules sufficiently address the issues raised at the February 2019 Board meeting and that the deleted sentence is not necessary.

Upon Board approval of the proposed rules, Staff will formally submit them 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).

Attached are the following:

- 1) Minutes of the February 28, 2019, Open Meeting (**Exhibit 1**);
- 2) Staff’s February Memorandum to the Board (**Exhibit 2**);
- 3) Proposed draft Notice of Public Hearing, with changes tracked (**Exhibit 3**); and
- 4) Proposed draft Notice of Public Hearing (**Exhibit 4**).

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<sup>1</sup> OATH Rules § 1-31(c) states: “All settlement offers, whether or not made at a conference, will be confidential and will be inadmissible at trial of any case. Administrative law judges must not be called to testify in any proceeding concerning statements made at a settlement conference.”

## Minutes of the Open Meeting of the New York City Conflicts of Interest Board

**Date:** February 28, 2019

**Location:** Baker Hostetler, 45 Rockefeller Plaza, 14<sup>th</sup> Fl., New York, New York

**Present:**

Board Members: Chair Richard Briffault and Members Fernando A. Bohorquez, Jr., Jeffrey D. Friedlander, and Erika Thomas

Board Staff: Ethan Carrier, Chad Gholizadeh, Christopher Hammer, Gavin Kendall, Julia Lee, Carolyn Miller, Katherine Miller, Ari Mulgay, Jeff Tremblay, Michele Weinstat, Clare Wiseman, and Juliya Ziskina.

Guests: Edward King

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The meeting was called to order by the Chair at approximately 9:36 a.m. The Chair stated that the meeting was being conducted pursuant to the New York State Open Meetings Law and designated the undersigned as the Recording Secretary for purposes of the meeting.

The Chair stated that the meeting was called to discuss proposed amendments to Title 53 of the Rules of the City of New York, Board Rules Chapter 2 and § 1-14.

### **Board Rules Chapter 2:**

After a brief introduction by a member of Board Staff on the proposed amendments to Board Rules Chapter 2, the Chair asked for any comments by the Board or Staff.

The following comments constitute the changes as agreed upon by the Board to the proposed amendments to Board Rules Chapter 2:

- Commentary: To include discussion of confidential letters issued to public servants.
- Board Rules § 2-01: No comments.
- Board Rules § 2-02(b)(1): To clarify that the response can address both factual and legal allegations in the Notice.
- Board Rules § 2-02(c)(2): To modify language such that the Board may proceed with its enforcement action without waiting for the conclusion of agency disciplinary action.
- Board Rules § 2-03(c)(2): To modify language in the last clause to reflect that the Board or the attorney serving as counsel to the Board determines if *ex parte* communications are necessary.
- Board Rules § 2-03(f)(1): To broaden language referring to “offers of settlement” to include offers and admissions.
- Board Rules § 2-03(c)(2) or § 2-03(i): To include a reference that Board review of the OATH report occurs in the absence of the Enforcement Unit attorneys.

Upon motion duly made and seconded, the Board unanimously voted to approve the proposed amendments incorporating the changes as discussed.

### **Board Rules § 1-14:**

After a brief introduction by a member of Board Staff on the proposed amendments to Board Rules § 1-14, the Chair asked for any comments by the Board or Staff.

In the Statement of Basis and Purpose of the Proposed Rule, on page 4, line 9, modify the first sentence to state: "Paragraph (a)(1) of Board Rules § 1-14."

Upon motion duly made and seconded, the Board unanimously voted to approve the proposed amendments as discussed as the final rule.

The open meeting was adjourned at approximately 10:45 a.m.

Respectfully submitted,

Julia Lee  
Recording Secretary

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

To: Members of the Board

From: Katherine Miller

Date: February 21, 2019

Re: Proposed Amendment of Chapter 2 of the Board Rules

Chapter 2 of the Board Rules contains the procedural rules for enforcement actions brought by the Board pursuant to Charter § 2603(h). The existing version of Chapter 2 was adopted in 1991 and amended in 1996 when the Board’s enforcement power was relatively new.<sup>1</sup> Over the past two decades, the Board has gained substantial experience adjudicating violations of the City’s conflicts of interest law. In doing so, the Board has developed a robust enforcement practice with procedures that extend beyond those envisioned by the early Board. Thus, Staff proposes revising Chapter 2 in its entirety to update the Board’s procedural rules and provide clearer guidance about the Board’s enforcement process. Attached as **Exhibit 1** is the Notice of Public Hearing and Opportunity to Comment, which includes the proposed Commentary, proposed Board Rules, and existing Board Rules.

### Discussion & Recommendation

The proposed revisions to Chapter 2 are intended to accomplish three primary goals: (1) codify and clarify the Board’s current enforcement procedures; (2) eliminate provisions that are redundant or no longer relevant; and (3) improve the Board’s current process. While the existing version of Chapter 2 is titled “Procedural Rules for Hearings,” the Board’s enforcement process is comprised of two phases – informal proceedings and formal proceedings. These proceedings

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<sup>1</sup> When the Conflicts of Interest Board was created to replace the Board of Ethics in the late 1980s, its powers were expanded beyond those of the Board of Ethics to include, among other responsibilities, enforcement and rulemaking. The Charter Revision Commission stated that the Board’s promulgated rules “may include rules necessary to assist members of the public and public servants to participate in the board’s processes.” Volume II, Report of the New York City Charter Revision Commission, December 1986 – November 1988, at 156.

would be outlined separately and chronologically in the proposed rules. Moreover, at the time the existing Board Rules were promulgated, the Board envisioned that hearings might be conducted by the Board, a member of the Board, or the New York City Office of Administrative Trials and Hearings (“OATH”). Because all Board hearings are held at OATH, many of the existing provisions are now irrelevant. Finally, the proposed rules would improve the Board’s current process by updating certain deadlines and requirements.

Staff recommends the Board approve the proposed Commentary and Board Rules for submission 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).

**New York City Conflicts of Interest Board**

**Notice of Public Hearing and Opportunity to Comment on Proposed Rules Regarding Procedural Rules for Enforcement Actions**

**What are we proposing?** The Conflicts of Interest Board intends to amend its rules by revising Chapter 2 in its entirety to update the Board’s procedural rules for enforcement actions brought pursuant to Charter § 2603(h).

**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 Katherine Miller, Assistant Counsel, at Rules@COIB.nyc.gov
- **Mail.** You can mail comments to Katherine Miller, Assistant 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-xxxx. 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) 437-0723. 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 the public at the Conflicts of Interest Board, 2 Lafayette Street, Suite #1010, New York, New York 10007.

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**What authorizes the Conflicts of Interest Board to make this rule?** Sections 1043, 2601(11) and 2603(a) of the City Charter authorize the Conflicts of Interest Board to make this proposed rule. This proposed rule was not included in the Conflicts of Interest Board’s regulatory agenda for this Fiscal Year because it was not contemplated when the Conflicts of Interest Board published the agenda.

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

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

## STATEMENT OF BASIS AND PURPOSE

### Overview

The Board proposes revising Chapter 2 of the Rules of the Board in its entirety to update the Board’s procedures for enforcement actions brought pursuant to Charter § 2603(h). During the Charter revision process of the late 1980s, the Conflicts of Interest Board was created to replace the Board of Ethics, an agency that had the power to issue advice but not to prosecute those who failed to comply with the ethics code. Recognizing that “the lack of enforcement power in the Board of Ethics was a significant flaw in the law,” the Charter Revision Commission proposed, and the City’s voters approved, the creation of a new Board with the power to adjudicate alleged violations of the conflicts of interest law. Volume II, Report of the New York City Charter Revision Commission, December 1986 – November 1988, at 163. Shortly thereafter, the Conflicts of Interest Board promulgated the existing version of Chapter 2 to guide its nascent enforcement process. In the more than two decades since, the Board has gained substantial experience adjudicating alleged violations. In doing so, the Board has learned which provisions of Chapter 2 work well, which do not, and which could use further clarification. Over the years, the Board has also utilized additional procedures to fill in the gaps

1 left by the existing rules. The Board proposes revising Chapter 2 to reflect its current  
2 enforcement process and to improve, where needed, that process.

3 The Board’s proposed procedural rules are designed to ensure that the subject of an  
4 enforcement action – the “respondent” – is afforded a full and fair opportunity to be heard by the  
5 Board. The first step in ensuring that a respondent has an opportunity to be heard by the Board is  
6 for the respondent to be able to understand what to expect during the enforcement process. When  
7 the Charter Revision Commission proposed creating the Board with rulemaking authority, it  
8 stated that the Board’s promulgated rules “may include rules necessary to assist members of the  
9 public and public servants to participate in the board’s processes.” Volume II, Report of the New  
10 York City Charter Revision Commission, December 1986 – November 1988, at 156. The Board  
11 proposes this revised version of Chapter 2 as a plain language guide to help respondents navigate  
12 that process, especially since many respondents represent themselves *pro se* before the Board  
13 and the confidentiality restrictions of Chapter 68 shield much of the Board’s process from public  
14 view. Furthermore, because the Board’s enforcement process has developed beyond the existing  
15 procedural rules, the proposed rules would codify the Board’s current practice to provide useful  
16 guidance to respondents.

17 The proposed revisions to Chapter 2 would provide clarity around three main topics: (i)  
18 the two-phase enforcement process; (ii) hearings; and (iii) settlements. As provided for in  
19 Charter § 2603(h), respondents have two opportunities to respond to and resolve charges brought  
20 by the Board: first, through an informal proceeding; and then, if charges are not resolved during  
21 that informal phase, through a formal proceeding. The proposed Chapter 2 would memorialize  
22 this two-phase approach by creating separate sections to address each type of proceeding. With  
23 regard to formal proceedings, the Board, like most City agencies, has come to rely exclusively on

1 the expertise of professional Administrative Law Judges at the New York City Office of  
2 Administrative Trials and Hearings (“OATH”) to hold adjudicatory hearings. The Board  
3 proposes revising Chapter 2 to reflect this practice and to eliminate references to hearings held  
4 by the Board or a Board Member.

5 Recognizing that the majority of respondents choose to forego a hearing and resolve their  
6 enforcement actions by settlement agreement, the Board also proposes revising Chapter 2 to  
7 elucidate the settlement process. While the existing rules provide for “disposition by agreement,”  
8 the Board’s enforcement attorneys frequently must explain the specific requirements of the  
9 Board’s settlement process to respondents. The revised rules would provide more detail  
10 concerning the requirements for settlement agreements and the process by which such  
11 agreements are approved by the Board.

12 Finally, the proposed version of Chapter 2 would eliminate references to “§ 12-110 of the  
13 Administrative Code” because the Board has a separate set of procedures for enforcement of the  
14 annual disclosure law.

15 Proposed § 2-02 Informal Proceedings

16 Proposed § 2-02 would explain the Board’s informal proceedings. During this phase, the  
17 respondent has the opportunity to respond to the Board and to conclude the enforcement action  
18 through dismissal or settlement without going through the formalities of an adjudicatory hearing.  
19 If the enforcement action is not concluded during this phase, the respondent will have another  
20 opportunity to do so through the hearing process. Proposed Board Rules in § 2-02 would address  
21 the steps that take place between the Board’s initial determination of probable cause and, if  
22 necessary, the Board’s decision to proceed to a hearing at OATH.

1           When the Board determines there is probable cause to believe that an individual or  
2 organization under its jurisdiction has violated an applicable law, see proposed Board Rules § 2-  
3 01(a), the Board ~~commences~~will commence an enforcement action by sending the respondent a  
4 Notice of Initial Determination of Probable Cause. See Proposed Board Rules § 2-02(a). ~~After~~  
5 ~~receiving~~Alternatively, if the Board determines that there is insufficient evidence to support an  
6 initial determination of probable cause, if the violation is minor, or if there is some other  
7 mitigating or extenuating factor, the Board may issue a confidential letter to advise the recipient  
8 about the relevant provisions of the applicable law.

9           After the Board commences an enforcement action by sending the Notice, the respondent  
10 may submit a response to the Board. Proposed Board Rules § 2-02(b) would clarify that the  
11 response must be submitted in writing for the Board’s review. The response is an opportunity for  
12 the respondent to demonstrate why the Board should reconsider its initial determination of  
13 probable cause. If the respondent believes that the facts alleged in the Notice are incorrect,  
14 incomplete, or need clarification, the respondent may submit a response, including supporting  
15 evidence, to explain those circumstances. Similarly, if the respondent believes that the Board has  
16 misapplied the applicable law to the alleged facts, the respondent can present those arguments in  
17 a response. Proposed Board Rules § 2-02(b)(3)(i) would explain that the Board thoroughly  
18 reviews all information and arguments in a response to determine whether any or all of the  
19 violations alleged in the Notice should be dismissed. However, if a respondent provides no new  
20 information or legal arguments to the Board, there is nothing for the Board to reconsider and the  
21 Board’s initial determination of probable cause will be deemed sustained. See Proposed Board  
22 Rules § 2-02(b)(3)(ii).

1           After receiving the Notice, respondents occasionally request the Board’s underlying  
2 evidence. Because the Board has learned that discovery is better handled under the supervision  
3 of an Administrative Law Judge at OATH, proposed Board Rules § 2-02(b)(1) would inform  
4 respondents of the Board’s long-standing practice that discovery is not available during informal  
5 proceedings.

6           Pursuant to Charter § 2603(h)(1), the Board is required to give the respondent a  
7 reasonable amount of time to respond to the Notice. Proposed Board Rules § 2-02(b) would  
8 update the prescribed time to submit a response to reflect the Board’s current practice and to  
9 establish a process by which the respondent may seek an extension to that deadline. Under  
10 existing Board Rules §§ 2-01(a) and 2-05(e), the respondent has fifteen days from the date of  
11 service, or twenty days if service was by mail, to respond to the Notice. Because the Notice is  
12 always served by first-class mail, proposed Board Rules § 2-02(b)(1) would clarify that the  
13 respondent has twenty days to respond to the Notice.

14           Upon receiving the Notice, many respondents request an extension to the twenty-day  
15 deadline, which the Board generally grants, to pursue settlement discussions or to give the  
16 respondent more time to prepare a response. Proposed Board Rules § 2-02(b)(2) would set  
17 parameters for requesting and granting extensions and establish specific time limits for those  
18 extensions. These specific time limits would both give respondents adequate time to respond  
19 while also preventing enforcement actions from languishing; if the Board does not receive a  
20 written response or a request for an extension within the prescribed time, the Board’s initial  
21 determination of probable cause would be deemed sustained pursuant to proposed Board Rules  
22 § 2-02(b)(3)(ii).

1 Pursuant to Charter § 2603(h)(2), if the Board sustains its initial determination of  
2 probable cause concerning any of the violations alleged in the Notice, the Board will proceed to  
3 a hearing or, if the respondent is entitled to disciplinary rights, refer the matter to the  
4 respondent’s City agency. Proposed Board Rules § 2-02(c) would explain the process by which  
5 the Board refers the respondent’s alleged violations to his or her City agency and clarify that,  
6 even if a matter has been referred to the respondent’s City agency, the Board may still proceed to  
7 a hearing, as contemplated by Charter § 2603(h)(6), if the agency declines to take disciplinary  
8 action or if the Board is unable to resolve the matter together with the agency.

9 Rather than proceeding to a hearing, the respondent may choose to resolve the Board’s  
10 enforcement action through settlement. While existing Board Rules § 2-05(h) provides for  
11 “disposition by agreement,” the current provision offers limited guidance to respondents about  
12 the contents of such agreements or the settlement process generally. Proposed Board Rules § 2-  
13 02(f) would address the entire settlement process by memorializing the requirements and  
14 procedures developed by the Board for the negotiation and approval of settlements. A settlement  
15 agreement with the Board may take the form of either a Public Disposition or a Public Warning  
16 Letter. While the majority of enforcement actions are settled with a Public Disposition, the Board  
17 may offer to settle a matter with a Public Warning Letter under limited circumstances, such as  
18 when mitigating factors are present. For each form of settlement agreement, the Board requires  
19 that the agreement contain certain information. See Proposed Board Rules § 2-02(f)(1). Just as  
20 Charter § 2603(h)(4) requires all Board orders be made public as the final disposition in an  
21 enforcement action, the Board likewise requires all settlement agreements be made public to  
22 educate other City employees about the Board’s interpretation of the applicable law. See  
23 Proposed Board Rules § 2-02(f)(4)(i).

1           A proposed settlement agreement is not final until all monetary penalties due to the Board  
2 have been paid and the agreement is signed by the Board. Because many settlement agreements  
3 include the payment of a monetary penalty to the Board, proposed Board Rules § 2-02(f)(3)  
4 would codify the Board’s practice with regard to the timing and handling of such payments, and  
5 proposed Board Rules § 2-02(f)(4) would clarify that a proposed settlement agreement will not  
6 be presented to the Board for final approval until all monetary penalties due to the Board have  
7 been paid. When the Board reviews a proposed settlement, there is a possibility that the Board  
8 may request a different penalty or ask to modify language in the agreement. Thus, proposed  
9 Board Rules § 2-02(f)(4) would inform respondents that a proposed settlement agreement is not  
10 final until it is approved and signed by the Board.

11           When negotiating a settlement, respondents occasionally request that their employing  
12 City agency be joined as a party to avoid possible future disciplinary action by their agency for  
13 the same conduct. Proposed Board Rules § 2-02(f)(2) would inform respondents that, if the  
14 respondent submits a waiver of confidentiality, the Board may speak to their agency about a  
15 three-way settlement.

16 Proposed § 2-03 Formal Proceedings

17           Proposed § 2-03 would explain the Board’s formal proceedings. During this phase, the  
18 respondent has the opportunity to respond to the Board’s charges and present evidence at an  
19 adjudicatory hearing before an Administrative Law Judge (“ALJ”) at OATH. The ALJ will issue  
20 a report to the Board, and the Board will review the report, along with the evidentiary record, to  
21 make its final determination about whether the respondent violated the applicable law. Proposed  
22 Board Rules in § 2-03 would address the steps that take place between commencement of formal  
23 proceedings at OATH and final action by the Board.

1 Pursuant to Charter § 2603(h)(2), the Board “shall hold or direct a hearing to be held” to  
2 determine whether the respondent has violated the applicable law. When the existing rules were  
3 drafted, the Board envisioned that hearings might be conducted by the Board, a member of the  
4 Board, or OATH. However, neither the Board nor any Board member has ever held a hearing.  
5 Instead, all such hearings are conducted by the OATH Trial Division. OATH provides an  
6 impartial forum and is staffed by professional ALJs who regularly handle adjudicatory  
7 proceedings for many City agencies. Proposed Board Rules § 2-03(a) would codify the Board’s  
8 current practice that hearings are held at OATH in accordance with OATH’s Rules of Practice,  
9 which are set forth in Title 48 of the Rules of the City of New York (“OATH Rules”). Once the  
10 Board commences formal proceedings, the OATH Rules govern the hearing process.

11 Because OATH has its own set of procedural rules, the proposed Board Rules would  
12 eliminate existing provisions that are redundant of the OATH Rules except for a few provisions  
13 to provide additional guidance to respondents or impose requirements beyond the OATH Rules.  
14 To ensure that respondents understand when the Board has commenced formal proceedings,  
15 proposed Board Rules § 2-03(b) would identify the documents that are served and filed by the  
16 Board, as required by the OATH Rules, and would specify the precise method of service for  
17 those documents. Because the Board tries to coordinate with respondents on dates for a  
18 settlement conference and a hearing before filing a Petition at OATH, proposed Board Rules § 2-  
19 03(b)(1) would provide context to this request. Under the OATH Rules, the respondent may  
20 submit an answer to the Board’s charges in the Petition. Expanding on the OATH Rules,  
21 proposed Board Rules § 2-03(d) would preserve and update existing Board Rules § 2-02(d),  
22 which advises respondents about the information they may want to include in an answer and  
23 requires them to provide their contact information. Because it is not covered by the OATH

1 Rules, proposed Board Rules § 2-03(f) would codify the Board’s burden of proof for finding that  
2 the respondent violated the applicable law. Additionally, proposed Board Rules § 2-03(f) would  
3 provide guidance to respondents concerning the trial sequence.

4         After a hearing is conducted at OATH, the ALJ issues a report of recommended findings  
5 of fact and conclusions of law and recommended disposition for the enforcement action, which  
6 may include imposing a penalty or dismissing some or all of the Board’s charges. See Proposed  
7 Board Rules 2-03(g). Under existing Board Rules § 2-04(a), the respondent and the enforcement  
8 attorney have ten days from the date of service of the report to submit a comment to the Board.  
9 In practice, the respondent often needs more than ten days and the enforcement attorney may  
10 wait to see what, if anything, the respondent submits before making a submission. Proposed  
11 Board Rules § 2-03(h) would revise the prescribed time to submit a comment to the Board and  
12 establish a more fair process by giving the parties a longer amount of time to submit a comment  
13 to the Board and giving each party an opportunity to respond to the comment submitted by the  
14 opposing party.

15         Proposed Board Rules § 2-03(i) would memorialize the Board’s burden of proof and  
16 identify the specific materials reviewed by the Board in making its final determination about  
17 whether the respondent violated the applicable law. If the Board determines that the respondent  
18 has committed a violation, the Board will issue an order to the respondent pursuant to Charter  
19 § 2603(h)(3). Proposed Board Rules § 2-03(j)(1) would provide a more concise and plain  
20 language description of the content of such orders, and make clear that all Board orders are made  
21 public. Furthermore, proposed Board Rules §§ 2-03(g) and 2-03(j)(2) would make clear that,  
22 while the OATH report is confidential at the time it is issued, the report may become public as  
23 part of the Board’s final order. Finally, proposed Board Rules § 2-03(j)(3)-(4) would codify the

1 method of service for Board orders and the Board’s practice of setting a thirty-day deadline from  
2 the date of service for the payment of a monetary penalty imposed in a Board order.  
3 Alternatively, if the Board determines, after a hearing, that there is not sufficient evidence to  
4 determine that the respondent violated the applicable law, proposed Board Rules § 2-03(k) would  
5 explain that the respondent is sent the Board’s final decision in writing and that all materials  
6 remain confidential.

7 Throughout the formal proceedings phase, the attorneys in the Board’s advice unit act as  
8 counsel to the Board when the Board reviews the materials and makes its final determination.  
9 Thus, proposed Board Rules § 2-02(c) would preserve existing Board Rules 2-05(g) by  
10 prohibiting *ex parte* communications between the enforcement attorney and the Board’s advice  
11 attorneys regarding the merits of the enforcement action after formal proceedings are  
12 commenced.

13 **Text of Proposed Board Rules**

14 New material is underlined.

15 [Deleted material is in brackets.]

16  
17 **Chapter 2: Procedural Rules for Enforcement Actions**

18 **§ 2-01 Applicability and Definitions.**

19 (a) Applicability.

20 This chapter establishes the procedural rules for enforcement actions brought pursuant to Charter  
21 § 2603(h) to address alleged violations of: Chapter 68 of the New York City Charter, the  
22 Conflicts of Interest Law; § 3-224 through § 3-228 of the New York City Administrative Code,  
23 the Lobbyist Gift Law; § 3-901 through § 3-907 of the New York City Administrative Code, the

1 Affiliated Not-for-Profits Law; and § 3-1101 through § 3-1107 of the New York City  
2 Administrative Code, the Legal Defense Trusts Law.

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4 (b) Definitions.

5 (1) The term “day” means a calendar day. When the last day of a time period is a  
6 Saturday, Sunday, or public holiday, the time period will run until the end of the next  
7 business day.

8 (2) The term “enforcement attorney” means any attorney prosecuting the enforcement  
9 action on behalf of the Board.

10 (3) The term “OATH” means the New York City Office of Administrative Trials and  
11 Hearings.

12 (4) The term “OATH Rules” means OATH’s Rules of Practice, as set forth in Title 48 of  
13 the Rules of the City of New York.

14 (5) The term “respondent” means a public servant, a former public servant, a lobbyist or  
15 any other person required to be listed on a statement of registration pursuant to New  
16 York City Administrative Code § 3-213(c)(1), an organization affiliated with an  
17 elected official, as defined by New York City Administrative Code § 3-901, an agent  
18 of an elected official, as defined by New York City Administrative Code § 3-901, or a  
19 legal defense trust, trustee, or beneficiary, as defined by New York City  
20 Administrative Code § 3-1101, who or that has been served a Notice of Initial  
21 Determination of Probable Cause.

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23 § 2-02 Informal Proceedings.

1 (a) Notice of Initial Determination of Probable Cause.

2 For the purposes of Charter § 2603(h)(1), the Board will commence an enforcement action by  
3 servicing a Notice of Initial Determination of Probable Cause by first class mail to the  
4 respondent's last known residential address or actual place of business.

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6 (b) Response to the Notice of Initial Determination of Probable Cause.

7 (1) For the purposes of Charter § 2603(h)(1), the respondent has twenty (20) days from  
8 the date of service to submit a written response to the Notice of Initial Determination  
9 of Probable Cause or request an extension. The response is an opportunity to explain,  
10 rebut, or provide information concerning the ~~factual or legal~~ allegations in the Notice.  
11 The Board will not consider requests for discovery of evidence during informal  
12 proceedings.

13 (2) Upon oral or written request within twenty (20) days from the date of service of the  
14 Notice, the respondent will be granted a thirty (30) day extension to submit a written  
15 response. Upon oral or written request made prior to the expiration of the first  
16 extension, the respondent will be granted a second thirty (30) day extension for good  
17 cause shown, including, but not limited to, ongoing settlement negotiations. Any  
18 further extensions must be requested in writing to the Board and will be granted only  
19 in exigent circumstances.

20 (3) For the purposes of Charter § 2603(h)(2):

21 (i) If the respondent submits a substantive written response to the Notice, the  
22 Board will review the response to determine whether there remains  
23 probable cause to believe that any alleged violation occurred and will

1                           either dismiss the enforcement action or sustain its initial determination of  
2                           probable cause in whole or in part.

3                   (ii) If the respondent does not submit a written response to the Notice or  
4                   submits only a general denial of the allegations in the Notice, the Board's  
5                   initial determination of probable cause will be deemed sustained.

6  
7 (c) Referral to agency.

8 If the Board sustains its initial determination of probable cause against a respondent who has  
9 disciplinary rights as described in Charter § 2603(h)(2), the Board will notify the respondent's  
10 employing City agency in writing of the alleged facts and violations.

11           (1) If the agency is not pursuing disciplinary action against the respondent, the Board will  
12           commence formal proceedings against the respondent.

13           (2) If the agency is pursuing disciplinary action against the respondent, the Board may  
14           resolve the enforcement action together with the agency. If the Board is unable to  
15           resolve the enforcement action together with the agency, the Board may commence  
16           formal proceedings against the respondent~~upon conclusion of the agency's~~  
17           disciplinary action.

18  
19 (d) Representation by an attorney or other person.

20           (1) If the respondent elects to be represented by an attorney or any other person, the  
21           representative appearing for the respondent must submit a written notice of  
22           appearance to the Board. The appearance of a member in good standing of the bar of  
23           a court of general jurisdiction of any state or territory of the United States will be

1 indicated by the designation “Attorney for (person represented).” The appearance of  
2 any other person will be indicated by the designation “Representative for (person  
3 represented).” The Board will not accept a response from or discuss the details of an  
4 enforcement action with any attorney or other person who has not submitted a notice  
5 of appearance.

6 (2) To withdraw from representation, the representative must submit a written notice of  
7 withdrawal to the Board, signed by the respondent or otherwise explaining the reason  
8 for withdrawal. An attorney who has submitted a notice of appearance may withdraw  
9 from representation only with consent of the respondent or when other cause exists,  
10 as delineated in the applicable provisions of the New York Rules of Professional  
11 Conduct.

12 (3) A notice of appearance, withdrawal or substitution may be submitted to the Board at  
13 any time prior to commencement of formal proceedings. After the service of the  
14 Notice of Petition and Petition pursuant to Board Rules § 2-03(b)(1), the OATH  
15 Rules apply.

16  
17 (e) Stay of an enforcement action.

18 To obtain a stay of an enforcement action prior to commencement of formal proceedings, the  
19 respondent must submit a written request to the Board for its review and approval. After the  
20 service of the Notice of Petition and Petition pursuant to Board Rules § 2-03(b)(1), the OATH  
21 Rules apply.

22  
23 (f) Settlement.

1           (1) At any time after the service of the Notice of Initial Determination of Probable Cause,  
2           an enforcement action may be resolved by settlement agreement in the form of a  
3           Public Disposition or Public Warning Letter.

4           (i)   A Public Disposition must include an admission of the relevant facts; an  
5           acknowledgment that the admitted conduct violated a specific provision of  
6           the Conflicts of Interest Law, the Lobbyist Gift Law, the Affiliated Not-  
7           for-Profits Law, or the Legal Defense Trusts Law; and an appropriate  
8           penalty to address the admitted conduct.

9           (ii)   A Public Warning Letter must include a statement of relevant facts, as  
10           understood by the Board, and a description of each violation of a specific  
11           provision of the Conflicts of Interest Law, the Lobbyist Gift Law, the  
12           Affiliated Not-for-Profits Law, or the Legal Defense Trusts Law.

13           (2) The language and penalty of the proposed settlement agreement will be negotiated  
14           between the enforcement attorney and the respondent or the respondent's  
15           representative, if applicable. If the respondent requests that the respondent's  
16           employing City agency be a party to the settlement, the respondent must submit a  
17           signed waiver of confidentiality to the Board to allow the enforcement attorney to  
18           discuss the proposed settlement agreement with the agency.

19           (3) If the enforcement attorney and the respondent reach a proposed settlement  
20           agreement, it will be reduced to writing and signed by the respondent, the  
21           respondent's representative, if applicable, and a representative of the respondent's  
22           employing City agency, if applicable. Any monetary penalty to be paid to the Board  
23           is due upon signing unless otherwise specified in the proposed settlement agreement.

1           Monetary penalty payments will be held by the Board in escrow until the proposed  
2           settlement agreement is fully executed by the Board.

3           (4) After receiving the full payment of any monetary penalty to be paid to the Board, the  
4           enforcement attorney will present the proposed settlement agreement to the Board for  
5           its review and approval.

6           (i)   If the Board approves the proposed settlement agreement, the settlement  
7           agreement will be signed by the Board Chair. The fully-executed  
8           settlement agreement will be made public, but all underlying records,  
9           reports, memoranda, and files of the enforcement action will remain  
10          confidential.

11          (ii) If the Board does not approve the proposed settlement agreement, the  
12          Board may direct the enforcement attorney to seek modification of the  
13          penalty or the language in the settlement agreement. The modified  
14          proposed settlement agreement must be reviewed and approved by the  
15          Board.

16  
17    **§ 2-03 Formal Proceedings.**

18    (a) Designation of OATH.

19    For the purposes of Charter § 2603(h)(2), the Board designates OATH to conduct hearings in  
20    accordance with the OATH Rules, except as otherwise provided by these rules.

21

22    (b) Commencement of formal proceedings.

1           (1) The Board will commence formal proceedings at OATH by serving a Notice of  
2           Petition and Petition by certified mail, return receipt requested, and first class mail to  
3           the respondent's last known residential address or actual place of business and to the  
4           respondent's representative, if applicable. After service, the enforcement attorney will  
5           file the Notice of Petition and Petition with OATH and will provide OATH with  
6           potential dates for a settlement conference and potential dates for a hearing.

7           (2) After the conference and hearing dates have been scheduled at OATH, the  
8           enforcement attorney will serve a Notice of Hearing by certified mail, return receipt  
9           requested, and first class mail to the respondent's last known residential address or  
10           actual place of business and to the respondent's representative, if applicable.

11  
12   (c) Ex Parte communications with the Board.

13           (1) After service of the Notice of Petition and Petition pursuant to Board Rules § 2-  
14           03(b)(1), any Board attorney involved in the prosecution of the enforcement action  
15           may not communicate *ex parte* with any member of the Board or any attorney serving  
16           as counsel to the Board concerning the merits of the enforcement action, except as  
17           provided in paragraph (2) of this subdivision.

18           (2) An enforcement attorney may communicate *ex parte* with members of the Board or  
19           an attorney serving as counsel to the Board with respect to ministerial matters  
20           involving the enforcement action; on consent of the respondent or respondent's  
21           representative; or ~~at the request of~~ ~~if~~ ~~deemed necessary by~~ the Board or an attorney  
22           serving as counsel to the Board ~~if necessary~~.

1 (d) Answer.

2 The respondent may serve and file a written answer to the Petition in accordance with the OATH  
3 Rules. The answer may contain specific responses, by admission, denial, or otherwise, to each  
4 allegation of the Petition and assert all affirmative defenses, if any. The respondent may include  
5 in the answer matters in mitigation. The answer must contain the full name, address, telephone  
6 number, and email address of the respondent. If the respondent is represented, the  
7 representative's name, address, telephone number and email address must also appear on the  
8 answer. The answer must be signed by the respondent or respondent's representative.

9

10 (e) Settlement.

11 At the OATH settlement conference, an enforcement action may be resolved by settlement  
12 agreement pursuant to Board Rules § 2-02(f).

13

14 (f) Hearing.

15 (1) The enforcement attorney will have the burden of proof by a preponderance of the  
16 evidence, which includes, but is not limited to, documents and testimony. ~~All offers~~  
17 ~~of settlement will be confidential and inadmissible at the hearing.~~

18 (2) The enforcement attorney will make an opening statement first, after which the  
19 respondent may make an opening statement.

20 (3) The enforcement attorney will initiate the presentation of evidence. After the  
21 enforcement attorney has completed the presentation of the Board's evidence, the  
22 respondent may present evidence. The enforcement attorney may present rebuttal  
23 evidence.

1           (4) The enforcement attorney will make a closing statement first, after which the  
2           respondent may make a closing statement.

3  
4   (g) OATH report.

5   After a hearing has been conducted, OATH will issue a confidential report of its recommended  
6   findings of fact and conclusions of law and its recommended disposition of the enforcement  
7   action. OATH will send the report, along with the original transcript of the hearing and all  
8   documents introduced into the record, to the Board for review. OATH will send a copy of the  
9   report to the enforcement attorney and the respondent or respondent's representative, if  
10   applicable.

11  
12   (h) Comment on OATH report.

13   Within twenty (20) days from the date of the OATH report, each party may submit a comment to  
14   the Board. The comment is an opportunity to explain, rebut, or provide information concerning  
15   OATH's recommended findings of fact, conclusions of law, and disposition. If either party  
16   submits a comment, the opposing party may submit to the Board a response to the comment  
17   within thirty (30) days from the date of the OATH report. Copies of all such submissions must be  
18   shared with the opposing party. The Board will not consider any new evidence submitted in a  
19   comment or in a response to a comment.

20  
21   (i) Final review by the Board.

22   For the purposes of Charter § 2603(h)(3), the Board will review the OATH report, along with the  
23   original transcript of the hearing and all documents introduced into the record, and any

1 comments and responses to comments submitted to the Board pursuant to Board Rules § 2-03(h),  
2 to determine whether it has been proven by a preponderance of the evidence that the respondent  
3 violated a provision of the Conflicts of Interest Law, the Lobbyist Gift Law, the Affiliated Not-  
4 for-Profits Law, or the Legal Defense Trusts Law. In accordance with Board Rules § 2-03(c),  
5 any Board attorney involved in the prosecution of the enforcement action will not participate in  
6 the Board's final review.

7  
8 *(j) Board order finding a violation.*

9 (1) If the Board determines that it has been proven by a preponderance of the evidence  
10 that the respondent violated a provision of the Conflicts of Interest Law, the Lobbyist  
11 Gift Law, the Affiliated Not-for-Profits Law, or the Legal Defense Trusts Law, the  
12 Board will issue an order stating its final findings of fact and conclusions of law and  
13 imposing a penalty, except, if the respondent is a current Member or employee of the  
14 New York City Council, the Board will issue an order stating its final findings of fact  
15 and conclusions of law and recommending a penalty to the New York City Council.  
16 The order will include notice of the respondent's right to appeal to the New York  
17 State Supreme Court.

18 (2) All orders of the Board will be made public. The Board may also make the OATH  
19 report public as part of its order, but all other underlying records, reports,  
20 memoranda, and files will remain confidential.

21 (3) The order will be sent by first class mail to the respondent's last known residential  
22 address or actual place of business and to the respondent's representative, if  
23 applicable.

1           (4) If the order imposes a monetary penalty, payment is due to the Board within thirty  
2           (30) days of the date of service. If the respondent does not pay the full monetary  
3           penalty amount, the Board will refer the matter to the New York City Law  
4           Department for collection.

5  
6 (k) Board dismissal.

7 If the Board determines that it has not been proven by a preponderance of the evidence that the  
8 respondent violated any provision of the Conflicts of Interest Law, the Lobbyist Gift Law, the  
9 Affiliated Not-for-Profits Law, or the Legal Defense Trusts Law, the Board will issue a written  
10 decision that dismisses the enforcement action and states its final findings of fact and  
11 conclusions of law. The decision will be sent to the respondent and respondent’s representative,  
12 if applicable, and will not be made public. All underlying records, reports, memoranda, and files  
13 will remain confidential.

14  
15  
16 **[Chapter 2: Procedural Rules for Hearings.**

17 **§2-01 Initial Determination**

18 **§2-02 Commencement of Formal Proceedings and Pleadings**

19 **§2-03 Hearing**

20 **§2-04 Decisions and Orders**

21 **§2-05 General Matters**

22  
23 **§2-01 Initial Determination.**

1 (a) *Notice.*

2 If the Board makes an initial determination, based on a complaint, investigation, or other  
3 information available to the Board, that there is probable cause to believe that a public servant  
4 (which for purposes of Charter §2603(h) includes a former public servant) has violated a  
5 provision of Chapter 68 of the City Charter, the Board shall notify the public servant of its  
6 determination in writing. The notice shall contain a statement of the facts upon which the Board  
7 relied for its determination of probable cause and a statement of the provisions of law allegedly  
8 violated. The notice shall afford the public servant an opportunity, either orally or in writing, to  
9 respond to, explain, rebut, or provide information concerning the allegations in such notice  
10 within fifteen days of service of the notice. The notice shall also inform the public servant of his  
11 or her right to be represented by counsel or any other person, and shall include a copy of the  
12 Board's procedural rules. A notice of initial determination shall not be required in a proceeding  
13 brought pursuant to Section 12-110 of the Administrative Code.

14

15 (b) *Request for a stay.*

16 In response to the Board's notice, the public servant may apply to the Board for a stay of the  
17 proceedings, for good cause shown. The Board may grant or deny such request in its sole  
18 discretion.

19

20 (c) *Admission of facts.*

21 If, in response to the Board's notice, the public servant admits to the facts contained therein or to  
22 a violation of the provisions of Chapter 68 of the City Charter and elects to forgo a hearing, the  
23 Board may, after consulting with the head of the agency served or formerly served by the public

1 servant, or, in the case of an agency head, after consulting with the Mayor, issue an order finding  
2 a violation and imposing the penalties it deems appropriate under Chapter 68 of the City Charter,  
3 provided, however, that pursuant to Charter §2603(h)(3), the Board shall not impose penalties  
4 against members of the City Council, or public servants employed by the City Council or by  
5 members of the City Council, but may recommend to the City Council such penalties as the  
6 Board deems appropriate. When a penalty is recommended, the City Council shall report to the  
7 Board what action was taken.

8

9 *(d) No probable cause finding.*

10 If, after receipt of the public servant's response, the Board determines that there is no probable  
11 cause to believe that a violation has occurred, the Board shall dismiss the matter and inform the  
12 public servant in writing of its decision.

13

14 **§2-02 Commencement of Formal Proceedings and Pleadings.**

15 *(a) Determination of probable cause.*

16 If, after consideration of the public servant's response, the Board determines that there remains  
17 probable cause to believe that a violation of the provisions of Chapter 68 of the City Charter has  
18 occurred, and the public servant has not elected to forgo the hearing, the Board shall hold or  
19 direct a hearing to be held on the record to determine whether such violation has occurred.

20 If the public servant is subject to the jurisdiction of a state law provision or collective bargaining  
21 agreement which provides for the conduct of a disciplinary hearing by another body, the Board  
22 shall refer the matter to the appropriate entity. The hearing shall be conducted in accordance with  
23 the rules of that entity.

1 The Board may also refer a matter to the public servant's agency if the Board deems the violation  
2 to be minor or if other disciplinary charges are pending there against the public servant.

3

4 (b) *Petition.*

5 The Board shall institute formal proceedings by serving a petition on the public servant. The  
6 petition shall set forth the facts which, if proved, would constitute a violation of Chapter 68 of  
7 the City Charter or Section 12-110 of the Administrative Code, as well as the applicable  
8 provisions thereof which are alleged to have been violated. The petition shall also advise the  
9 public servant of the public servant's rights to file an answer, to a hearing, to be represented at  
10 such hearing by counsel or any other person, and to cross-examine witnesses and present  
11 evidence.

12

13 (c) *Answer.*

14 (1) *General rule.*

15 The public servant shall answer the petition by serving an answer on the Board within  
16 eight days after service of the petition, unless a different time is fixed by the Board. The  
17 public servant shall serve the answer personally or by certified or registered mail, return  
18 receipt requested.

19

20 (2) *Form and contents of answer.*

21 The answer shall be in writing and shall contain specific responses, by admission, denial,  
22 or otherwise, to each allegation of the petition and shall assert all affirmative defenses, if  
23 any. The public servant may include in the answer matters in mitigation. The answer shall

1 be signed and shall contain the full name, address, and telephone number of the public  
2 servant. If the public servant is represented, the representative's name, address, and  
3 telephone number shall also appear on the answer, which shall be signed by either the  
4 public servant or by his or her representative.

5  
6 *(3) Effect of failure to answer.*

7 If the public servant fails to serve an answer, all allegations of the petition shall be  
8 deemed admitted and the Board shall proceed to hold a hearing in which prosecuting  
9 counsel shall submit for the record an offer of proof establishing the factual basis on  
10 which the Board may issue an order. If the public servant fails to respond specifically to  
11 any allegation or charge in the petition, such allegation or charge shall be deemed  
12 admitted.

13  
14 *(d) Amendment of pleadings.*

15 Pleadings shall be amended as promptly as possible upon conditions just to all parties. If a  
16 pleading is to be amended less than twenty-five days before the commencement of the hearing,  
17 the amendment may be made only on consent of the parties or by leave of the Board, if the Board  
18 is conducting the hearing, or by leave of a Board member or Administrative Law Judge, if the  
19 Board member or Administrative Law Judge is conducting the hearing.

20  
21 **§2-03 Hearing.**

22 *(a) Conduct of hearings generally.*

1 Hearings shall be conducted by the Board or, upon designation by the Board, by a member of the  
2 Board or the Chief Administrative Law Judge of the Office of Administrative Trials and  
3 Hearings (OATH), or such administrative law judge (ALJ) as the Chief Administrative Law  
4 Judge shall assign.

5  
6 (b) *Subpoenas.*

7 Subpoenas requiring the attendance of a witness and subpoenas *duces tecum* requiring the  
8 production of books, papers, and other things may be issued only by (i) the Administrative Law  
9 Judge, where the hearing has been referred to OATH, or (ii) a member of the Board, where the  
10 hearing is conducted by the Board or by a member of the Board, upon application of a party or  
11 upon the Administrative Law Judge's or the Board member's own motion. In addition to or in  
12 lieu of these subpoenas, the Administrative Law Judge or the Board member may also issue an  
13 order directing the party or person under the control of a party to attend or produce.

14  
15 (c) *Conduct of hearings by OATH.*

16 If the Board refers a hearing to OATH, a copy of the petition shall also be sent to OATH at the  
17 time the public servant is served with the petition. OATH shall conduct the hearing in  
18 accordance with its rules, as set forth in Title 48 of the Rules of the City of New York, except as  
19 otherwise provided by these Rules.

20  
21 (d) *Conduct of hearings by the Board or by a Board member.*

22 (1) *Generally.*

1           The Board may hear a case or may designate a member of the Board to hear a case, make  
2           findings of fact and conclusions of law, preside over pre-hearing matters and  
3           adjournments, and make recommendations to the Board for the proposed disposition of  
4           the proceeding. When a hearing is conducted by the Board, the hearing shall be presided  
5           over by the Board's Chair or by his or her designee. The Board or Board member shall  
6           conduct the hearing, including such pre-hearing matters as conferences, discovery, and  
7           motion practice, in conformance with the rules and procedures of OATH, as set forth in  
8           Title 48 of the Rules of the City of New York, except as otherwise provided by these  
9           rules.

10  
11           *(2) Disposition conferences and agreements.*

12           If disposition of the proceeding is to be discussed at a conference, the Board shall  
13           designate an individual, other than a Board member participating in the hearing, to  
14           conduct the conference. During disposition discussions, upon notice to the parties, the  
15           person conducting the conference may confer with each party and/or representative  
16           separately. Board members shall not be called to testify in any proceeding concerning  
17           statements made at a disposition conference.

18  
19           *(3) Order of proceedings.*

20           Prosecuting counsel shall have the burden of proof by the preponderance of the evidence,  
21           shall initiate the presentation of evidence, and may present rebuttal evidence. The public  
22           servant may introduce evidence after prosecuting counsel has completed his or her case.  
23           Opening statements, if any, shall be made first by prosecuting counsel. Closing

1 statements, if any, shall be made first by the public servant. This order of proceedings  
2 may be modified at the discretion of the Board or Board member.

3

4 **§2-04 Decisions and Orders.**

5 (a) *Report to the Board.*

6 When a hearing has been conducted by either OATH or a member of the Board designated to  
7 hear the case, a report of recommended findings of fact and conclusions of law and  
8 recommendations for the disposition of the proceeding shall be issued and forwarded, along with  
9 the original transcript of the proceeding and all documents introduced into the record, to the  
10 Board for review and final action. The report shall not be made public. A copy of the report and  
11 recommendation shall be sent to all parties and their counsel or other representative in order to  
12 afford them the opportunity to comment before final action is taken by the Board. If prosecuting  
13 counsel or the public servant wishes to comment, he or she shall do so within ten days of service  
14 of the report and recommendation.

15

16 (b) *Finding of violation.*

17 If after the hearing and upon a consideration of all the evidence in the record of hearing,  
18 including comments, the Board finds that a public servant has engaged in conduct prohibited by  
19 Chapter 68 of the City Charter, the Board shall consult with the head of the agency served or  
20 formerly served by the public servant, or in the case of an agency head, consult with the Mayor.  
21 Where the Board finds a violation of Chapter 68 or section 12-110 of the Administrative Code,  
22 the Board shall state its final findings of fact and conclusions of law and issue an order imposing  
23 any penalties it deems appropriate under either statute. The order shall include notice of the

1 public servant's right to appeal to the New York State Supreme Court. Alternatively, in the case  
2 of a violation of Chapter 68, the Board may state its findings and conclusions and recommend a  
3 penalty, if any, to the head of the agency served by the public servant or former public servant  
4 or, in the case of an agency head or former agency head, to the Mayor. Pursuant to Charter  
5 §2603(h)(3), the Board shall not impose penalties against members of the City Council, or public  
6 servants employed by the City Council or by members of the City Council, but may state its  
7 findings and conclusions and recommend to the City Council such penalties as the Board deems  
8 appropriate. When a penalty is recommended, the head of the agency, Mayor, or City Council  
9 shall report to the Board what action was taken.

10

11 *(c) Consultation by agency.*

12 In instances where the Board does not hold a hearing and instead refers a matter to the public  
13 servant's agency, that agency shall consult with the Board prior to issuing its final decision.

14

15 *(d) Dismissals.*

16 If, after the hearing and upon consideration of the record, the Board finds that a public servant  
17 has not engaged in acts prohibited by Chapter 68 of the City Charter or section 12-110 of the  
18 Administrative Code, the Board shall state its findings of facts and conclusions of law and shall  
19 issue an order dismissing the petition. The order shall not be made public.

20

21 **§2-05 General Matters.**

22 *(a) Appearances before the Board.*

1 (1) A party may appear before the Board in person, by an attorney, or by a duly  
2 authorized representative. The person appearing for the party shall file a notice of  
3 appearance with the Board. The filing of any papers by an attorney or other  
4 representative who has not previously appeared shall constitute the filing of a notice of  
5 appearance by that person and shall conform to the requirements of paragraphs (2) and  
6 (4) of this subdivision.

7 (2) The appearance of a member in good standing of the bar of a court of general  
8 jurisdiction of any state or territory of the United States shall be indicated by the suffix  
9 "Esq." and the designation "Attorney for (person represented)." The appearance of any  
10 other person shall be indicated by the designation "Representative for (person  
11 represented)."

12 (3) Absent extraordinary circumstances, no application shall be made or argued by any  
13 attorney or other representative who has not filed a notice of appearance.

14 (4) A person may not file a notice of appearance on behalf of a party unless the person  
15 has been retained by that party to represent the party before the Board. Filing a notice of  
16 appearance constitutes a representation that the person appearing has been so retained.

17  
18 (b) *Withdrawal and substitution of counsel.*

19 (1) An attorney who has filed a notice of appearance shall not withdraw from  
20 representation without the permission of the Board, upon application. Withdrawals shall  
21 not be granted unless upon consent of the client or when other cause exists, as delineated  
22 in the applicable provisions of the Code of Professional Responsibility.<sup>1</sup>

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<sup>1</sup> Now the Rules of Professional Conduct

1 (2) Notices of substitution of counsel served and filed more than twenty days prior to a  
2 hearing before the Board or before a member of the Board may be filed without leave of  
3 the Board or Board member. Notices of substitution of counsel served and filed less than  
4 twenty-one days prior to a hearing before the Board or before a member of the Board  
5 may be filed only with the permission of the Board or Board member, which permission  
6 shall be freely given, absent prejudice or substantial delay of the proceedings.

7  
8 (c) *Service of petition by Board.*

9 A petition shall be served on the public servant

10 (i) in the manner provided in Section 312-a, or subdivisions 1, 2, or 4 of Section

11 308, of the New York Civil Practice Law and Rules for service of a summons or

12 (ii) by both certified mail, return receipt requested, and first class mail to the  
13 public servant's last known residence or actual place of business or

14 (iii) in such manner as the Board directs, if service is impracticable under  
15 paragraphs (i) and (ii) of this subdivision, or

16 (iv) in any manner agreed upon by counsel to the Board and the public servant or  
17 his or her representative.

18  
19 (d) *Service of other documents by Board.*

20 Notices, orders, and all other documents, except petitions and subpoenas, originating with the  
21 Board shall be served on the public servant

22 (1) by personal delivery to the public servant or

1 (2) by first class mail to the public servant's last known residence or actual place of  
2 business or

3 (3) by overnight delivery service to the public servant's last known residence or actual  
4 place of business or

5 (4) by telephonic facsimile (FAX) or similar transmission or

6 (5) by leaving the paper at the public servant's last known residence with a person of  
7 suitable age and discretion or

8 (6) in such manner as the Board directs, if service is impracticable under paragraphs (1),  
9 (2), (3), (4), or (5) of this subdivision, or

10 (7) in any manner agreed upon by counsel to the Board and the public servant or his or  
11 her representative. Where the public servant has appeared by a representative, all  
12 papers served by the Board subsequent to that appearance shall be served upon the  
13 representative by one of the methods provided in paragraphs (1)-(7) of this  
14 subdivision.

15  
16 (e) *Computation of time.*

17 The computation of any time period referred to in these rules shall be calculated in calendar  
18 days, except that when the last day of the time period is a Saturday, Sunday, or public holiday,  
19 the period shall run until the end of the next following business day. Where a period of time  
20 prescribed by the rules set forth in this chapter is measured from the service of a paper and  
21 service of that paper is made in the manner provided by paragraph (ii) of subdivision (c) or  
22 paragraph (2) of subdivision (d) of this section, five days shall be added to the prescribed period.

23

1 (f) *Confidentiality.*

2 All matters relating to complaints submitted to or inquired into by the Board, or any action taken  
3 by the Board in connection therewith or hearings conducted by the Board or OATH, shall be  
4 kept confidential unless the public servant waives confidentiality and the Board determines that  
5 confidentiality is not otherwise required. Hearings conducted by the Board or by OATH shall be  
6 public if requested by the public servant. Final findings, conclusions, and orders issued upon a  
7 violation of Chapter 68 shall be made public.

8

9 (g) *Ex Parte communications with Board.*

10 (1) After service of the petition in a case, counsel conducting the prosecution of the case  
11 on behalf of the Board shall not communicate *ex parte* with any member of the Board  
12 concerning the merits of the case, except as provided in paragraph (2) of this subdivision.

13 (2) Counsel conducting the prosecution of a case on behalf of the Board may  
14 communicate *ex parte* with the Board, or any member thereof, with respect to ministerial  
15 matters involving the case or on consent of the respondent or respondent's counsel or in  
16 an emergency.

17

18 (h) *Disposition by agreement.*

19 At any time after the service of a notice of probable cause in a proceeding brought pursuant to  
20 Chapter 68 or at any time after service of a petition in a proceeding brought pursuant to Section  
21 12-110 of the Administrative Code, the public servant and the Board may agree to dispose of the  
22 case by agreement. For this purpose, the Board or any Board member designated by the Board  
23 may conduct a disposition conference, provided that, when the Board or a member of the Board

1 conducts or is to conduct the hearing, the Board shall comply with the requirements of section 2-  
2 03(d)(2). All offers of disposition, whether made at a conference, hearing, or otherwise, shall be  
3 confidential and shall be inadmissible at trial of any case. If a disposition by agreement is  
4 reached, it shall be reduced to writing and signed by the public servant or his or her  
5 representative and the Board or, in the discretion of the Board, placed on the record. When a  
6 disposition by agreement contains an acknowledgment that a public servant's conduct has  
7 violated a provision of Chapter 68 of the City Charter or Section 12-110 of the Administrative  
8 Code, that disposition by agreement shall be made public by the Board.

9

10 (i) *OATH rules.*

11 In the event of any inconsistency between these rules and the rules of the Office of  
12 Administrative Trials and Hearings, these rules shall govern.]

## New York City Conflicts of Interest Board

### Notice of Public Hearing and Opportunity to Comment on Proposed Rules Regarding Procedural Rules for Enforcement Actions

**What are we proposing?** The Conflicts of Interest Board intends to amend its rules by revising Chapter 2 in its entirety to update the Board’s procedural rules for enforcement actions brought pursuant to Charter § 2603(h).

**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 Katherine Miller, Assistant Counsel, at Rules@COIB.nyc.gov
- **Mail.** You can mail comments to Katherine Miller, Assistant 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-xxxx. 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) 437-0723. 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 the public at the Conflicts of Interest Board, 2 Lafayette Street, Suite #1010, New York, New York 10007.

1  
2 **What authorizes the Conflicts of Interest Board to make this rule?** Sections 1043, 2601(11)  
3 and 2603(a) of the City Charter authorize the Conflicts of Interest Board to make this proposed  
4 rule. This proposed rule was not included in the Conflicts of Interest Board’s regulatory agenda  
5 for this Fiscal Year because it was not contemplated when the Conflicts of Interest Board  
6 published the agenda.

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

10  
11 **What rules govern the rulemaking process?** The Conflicts of Interest Board must meet the  
12 requirements of Section 1043 of the City Charter when creating or changing rules. This notice is  
13 made according to the requirements of Section 1043 of the City Charter.  
14

## 15 STATEMENT OF BASIS AND PURPOSE

### 16 Overview

17 The Board proposes revising Chapter 2 of the Rules of the Board in its entirety to update  
18 the Board’s procedures for enforcement actions brought pursuant to Charter § 2603(h). During  
19 the Charter revision process of the late 1980s, the Conflicts of Interest Board was created to  
20 replace the Board of Ethics, an agency that had the power to issue advice but not to prosecute  
21 those who failed to comply with the ethics code. Recognizing that “the lack of enforcement  
22 power in the Board of Ethics was a significant flaw in the law,” the Charter Revision  
23 Commission proposed, and the City’s voters approved, the creation of a new Board with the  
24 power to adjudicate alleged violations of the conflicts of interest law. Volume II, Report of the  
25 New York City Charter Revision Commission, December 1986 – November 1988, at 163.  
26 Shortly thereafter, the Conflicts of Interest Board promulgated the existing version of Chapter 2  
27 to guide its nascent enforcement process. In the more than two decades since, the Board has  
28 gained substantial experience adjudicating alleged violations. In doing so, the Board has learned  
29 which provisions of Chapter 2 work well, which do not, and which could use further  
30 clarification. Over the years, the Board has also utilized additional procedures to fill in the gaps

1 left by the existing rules. The Board proposes revising Chapter 2 to reflect its current  
2 enforcement process and to improve, where needed, that process.

3 The Board’s proposed procedural rules are designed to ensure that the subject of an  
4 enforcement action – the “respondent” – is afforded a full and fair opportunity to be heard by the  
5 Board. The first step in ensuring that a respondent has an opportunity to be heard by the Board is  
6 for the respondent to be able to understand what to expect during the enforcement process. When  
7 the Charter Revision Commission proposed creating the Board with rulemaking authority, it  
8 stated that the Board’s promulgated rules “may include rules necessary to assist members of the  
9 public and public servants to participate in the board’s processes.” Volume II, Report of the New  
10 York City Charter Revision Commission, December 1986 – November 1988, at 156. The Board  
11 proposes this revised version of Chapter 2 as a plain language guide to help respondents navigate  
12 that process, especially since many respondents represent themselves *pro se* before the Board  
13 and the confidentiality restrictions of Chapter 68 shield much of the Board’s process from public  
14 view. Furthermore, because the Board’s enforcement process has developed beyond the existing  
15 procedural rules, the proposed rules would codify the Board’s current practice to provide useful  
16 guidance to respondents.

17 The proposed revisions to Chapter 2 would provide clarity around three main topics: (i)  
18 the two-phase enforcement process; (ii) hearings; and (iii) settlements. As provided for in  
19 Charter § 2603(h), respondents have two opportunities to respond to and resolve charges brought  
20 by the Board: first, through an informal proceeding; and then, if charges are not resolved during  
21 that informal phase, through a formal proceeding. The proposed Chapter 2 would memorialize  
22 this two-phase approach by creating separate sections to address each type of proceeding. With  
23 regard to formal proceedings, the Board, like most City agencies, has come to rely exclusively on

1 the expertise of professional Administrative Law Judges at the New York City Office of  
2 Administrative Trials and Hearings (“OATH”) to hold adjudicatory hearings. The Board  
3 proposes revising Chapter 2 to reflect this practice and to eliminate references to hearings held  
4 by the Board or a Board Member.

5 Recognizing that the majority of respondents choose to forego a hearing and resolve their  
6 enforcement actions by settlement agreement, the Board also proposes revising Chapter 2 to  
7 elucidate the settlement process. While the existing rules provide for “disposition by agreement,”  
8 the Board’s enforcement attorneys frequently must explain the specific requirements of the  
9 Board’s settlement process to respondents. The revised rules would provide more detail  
10 concerning the requirements for settlement agreements and the process by which such  
11 agreements are approved by the Board.

12 Finally, the proposed version of Chapter 2 would eliminate references to “§ 12-110 of the  
13 Administrative Code” because the Board has a separate set of procedures for enforcement of the  
14 annual disclosure law.

15 Proposed § 2-02 Informal Proceedings

16 Proposed § 2-02 would explain the Board’s informal proceedings. During this phase, the  
17 respondent has the opportunity to respond to the Board and to conclude the enforcement action  
18 through dismissal or settlement without going through the formalities of an adjudicatory hearing.  
19 If the enforcement action is not concluded during this phase, the respondent will have another  
20 opportunity to do so through the hearing process. Proposed Board Rules in § 2-02 would address  
21 the steps that take place between the Board’s initial determination of probable cause and, if  
22 necessary, the Board’s decision to proceed to a hearing at OATH.

1           When the Board determines there is probable cause to believe that an individual or  
2 organization under its jurisdiction has violated an applicable law, see proposed Board Rules § 2-  
3 01(a), the Board will commence an enforcement action by sending the respondent a Notice of  
4 Initial Determination of Probable Cause. See Proposed Board Rules § 2-02(a). Alternatively, if  
5 the Board determines that there is insufficient evidence to support an initial determination of  
6 probable cause, if the violation is minor, or if there is some other mitigating or extenuating  
7 factor, the Board may issue a confidential letter to advise the recipient about the relevant  
8 provisions of the applicable law.

9           After the Board commences an enforcement action by sending the Notice, the respondent  
10 may submit a response to the Board. Proposed Board Rules § 2-02(b) would clarify that the  
11 response must be submitted in writing for the Board’s review. The response is an opportunity for  
12 the respondent to demonstrate why the Board should reconsider its initial determination of  
13 probable cause. If the respondent believes that the facts alleged in the Notice are incorrect,  
14 incomplete, or need clarification, the respondent may submit a response, including supporting  
15 evidence, to explain those circumstances. Similarly, if the respondent believes that the Board has  
16 misapplied the applicable law to the alleged facts, the respondent can present those arguments in  
17 a response. Proposed Board Rules § 2-02(b)(3)(i) would explain that the Board thoroughly  
18 reviews all information and arguments in a response to determine whether any or all of the  
19 violations alleged in the Notice should be dismissed. However, if a respondent provides no new  
20 information or legal arguments to the Board, there is nothing for the Board to reconsider and the  
21 Board’s initial determination of probable cause will be deemed sustained. See Proposed Board  
22 Rules § 2-02(b)(3)(ii).

1           After receiving the Notice, respondents occasionally request the Board’s underlying  
2 evidence. Because the Board has learned that discovery is better handled under the supervision  
3 of an Administrative Law Judge at OATH, proposed Board Rules § 2-02(b)(1) would inform  
4 respondents of the Board’s long-standing practice that discovery is not available during informal  
5 proceedings.

6           Pursuant to Charter § 2603(h)(1), the Board is required to give the respondent a  
7 reasonable amount of time to respond to the Notice. Proposed Board Rules § 2-02(b) would  
8 update the prescribed time to submit a response to reflect the Board’s current practice and to  
9 establish a process by which the respondent may seek an extension to that deadline. Under  
10 existing Board Rules §§ 2-01(a) and 2-05(e), the respondent has fifteen days from the date of  
11 service, or twenty days if service was by mail, to respond to the Notice. Because the Notice is  
12 always served by first-class mail, proposed Board Rules § 2-02(b)(1) would clarify that the  
13 respondent has twenty days to respond to the Notice.

14           Upon receiving the Notice, many respondents request an extension to the twenty-day  
15 deadline, which the Board generally grants, to pursue settlement discussions or to give the  
16 respondent more time to prepare a response. Proposed Board Rules § 2-02(b)(2) would set  
17 parameters for requesting and granting extensions and establish specific time limits for those  
18 extensions. These specific time limits would both give respondents adequate time to respond  
19 while also preventing enforcement actions from languishing; if the Board does not receive a  
20 written response or a request for an extension within the prescribed time, the Board’s initial  
21 determination of probable cause would be deemed sustained pursuant to proposed Board Rules  
22 § 2-02(b)(3)(ii).

1 Pursuant to Charter § 2603(h)(2), if the Board sustains its initial determination of  
2 probable cause concerning any of the violations alleged in the Notice, the Board will proceed to  
3 a hearing or, if the respondent is entitled to disciplinary rights, refer the matter to the  
4 respondent's City agency. Proposed Board Rules § 2-02(c) would explain the process by which  
5 the Board refers the respondent's alleged violations to his or her City agency and clarify that,  
6 even if a matter has been referred to the respondent's City agency, the Board may still proceed to  
7 a hearing, as contemplated by Charter § 2603(h)(6), if the agency declines to take disciplinary  
8 action or if the Board is unable to resolve the matter together with the agency.

9 Rather than proceeding to a hearing, the respondent may choose to resolve the Board's  
10 enforcement action through settlement. While existing Board Rules § 2-05(h) provides for  
11 "disposition by agreement," the current provision offers limited guidance to respondents about  
12 the contents of such agreements or the settlement process generally. Proposed Board Rules § 2-  
13 02(f) would address the entire settlement process by memorializing the requirements and  
14 procedures developed by the Board for the negotiation and approval of settlements. A settlement  
15 agreement with the Board may take the form of either a Public Disposition or a Public Warning  
16 Letter. While the majority of enforcement actions are settled with a Public Disposition, the Board  
17 may offer to settle a matter with a Public Warning Letter under limited circumstances, such as  
18 when mitigating factors are present. For each form of settlement agreement, the Board requires  
19 that the agreement contain certain information. See Proposed Board Rules § 2-02(f)(1). Just as  
20 Charter § 2603(h)(4) requires all Board orders be made public as the final disposition in an  
21 enforcement action, the Board likewise requires all settlement agreements be made public to  
22 educate other City employees about the Board's interpretation of the applicable law. See  
23 Proposed Board Rules § 2-02(f)(4)(i).

1           A proposed settlement agreement is not final until all monetary penalties due to the Board  
2 have been paid and the agreement is signed by the Board. Because many settlement agreements  
3 include the payment of a monetary penalty to the Board, proposed Board Rules § 2-02(f)(3)  
4 would codify the Board’s practice with regard to the timing and handling of such payments, and  
5 proposed Board Rules § 2-02(f)(4) would clarify that a proposed settlement agreement will not  
6 be presented to the Board for final approval until all monetary penalties due to the Board have  
7 been paid. When the Board reviews a proposed settlement, there is a possibility that the Board  
8 may request a different penalty or ask to modify language in the agreement. Thus, proposed  
9 Board Rules § 2-02(f)(4) would inform respondents that a proposed settlement agreement is not  
10 final until it is approved and signed by the Board.

11           When negotiating a settlement, respondents occasionally request that their employing  
12 City agency be joined as a party to avoid possible future disciplinary action by their agency for  
13 the same conduct. Proposed Board Rules § 2-02(f)(2) would inform respondents that, if the  
14 respondent submits a waiver of confidentiality, the Board may speak to their agency about a  
15 three-way settlement.

16 Proposed § 2-03 Formal Proceedings

17           Proposed § 2-03 would explain the Board’s formal proceedings. During this phase, the  
18 respondent has the opportunity to respond to the Board’s charges and present evidence at an  
19 adjudicatory hearing before an Administrative Law Judge (“ALJ”) at OATH. The ALJ will issue  
20 a report to the Board, and the Board will review the report, along with the evidentiary record, to  
21 make its final determination about whether the respondent violated the applicable law. Proposed  
22 Board Rules in § 2-03 would address the steps that take place between commencement of formal  
23 proceedings at OATH and final action by the Board.

1 Pursuant to Charter § 2603(h)(2), the Board “shall hold or direct a hearing to be held” to  
2 determine whether the respondent has violated the applicable law. When the existing rules were  
3 drafted, the Board envisioned that hearings might be conducted by the Board, a member of the  
4 Board, or OATH. However, neither the Board nor any Board member has ever held a hearing.  
5 Instead, all such hearings are conducted by the OATH Trial Division. OATH provides an  
6 impartial forum and is staffed by professional ALJs who regularly handle adjudicatory  
7 proceedings for many City agencies. Proposed Board Rules § 2-03(a) would codify the Board’s  
8 current practice that hearings are held at OATH in accordance with OATH’s Rules of Practice,  
9 which are set forth in Title 48 of the Rules of the City of New York (“OATH Rules”). Once the  
10 Board commences formal proceedings, the OATH Rules govern the hearing process.

11 Because OATH has its own set of procedural rules, the proposed Board Rules would  
12 eliminate existing provisions that are redundant of the OATH Rules except for a few provisions  
13 to provide additional guidance to respondents or impose requirements beyond the OATH Rules.  
14 To ensure that respondents understand when the Board has commenced formal proceedings,  
15 proposed Board Rules § 2-03(b) would identify the documents that are served and filed by the  
16 Board, as required by the OATH Rules, and would specify the precise method of service for  
17 those documents. Because the Board tries to coordinate with respondents on dates for a  
18 settlement conference and a hearing before filing a Petition at OATH, proposed Board Rules § 2-  
19 03(b)(1) would provide context to this request. Under the OATH Rules, the respondent may  
20 submit an answer to the Board’s charges in the Petition. Expanding on the OATH Rules,  
21 proposed Board Rules § 2-03(d) would preserve and update existing Board Rules § 2-02(d),  
22 which advises respondents about the information they may want to include in an answer and  
23 requires them to provide their contact information. Because it is not covered by the OATH

1 Rules, proposed Board Rules § 2-03(f) would codify the Board’s burden of proof for finding that  
2 the respondent violated the applicable law. Additionally, proposed Board Rules § 2-03(f) would  
3 provide guidance to respondents concerning the trial sequence.

4 After a hearing is conducted at OATH, the ALJ issues a report of recommended findings  
5 of fact and conclusions of law and recommended disposition for the enforcement action, which  
6 may include imposing a penalty or dismissing some or all of the Board’s charges. See Proposed  
7 Board Rules 2-03(g). Under existing Board Rules § 2-04(a), the respondent and the enforcement  
8 attorney have ten days from the date of service of the report to submit a comment to the Board.  
9 In practice, the respondent often needs more than ten days and the enforcement attorney may  
10 wait to see what, if anything, the respondent submits before making a submission. Proposed  
11 Board Rules § 2-03(h) would revise the prescribed time to submit a comment to the Board and  
12 establish a more fair process by giving the parties a longer amount of time to submit a comment  
13 to the Board and giving each party an opportunity to respond to the comment submitted by the  
14 opposing party.

15 Proposed Board Rules § 2-03(i) would memorialize the Board’s burden of proof and  
16 identify the specific materials reviewed by the Board in making its final determination about  
17 whether the respondent violated the applicable law. If the Board determines that the respondent  
18 has committed a violation, the Board will issue an order to the respondent pursuant to Charter  
19 § 2603(h)(3). Proposed Board Rules § 2-03(j)(1) would provide a more concise and plain  
20 language description of the content of such orders, and make clear that all Board orders are made  
21 public. Furthermore, proposed Board Rules §§ 2-03(g) and 2-03(j)(2) would make clear that,  
22 while the OATH report is confidential at the time it is issued, the report may become public as  
23 part of the Board’s final order. Finally, proposed Board Rules § 2-03(j)(3)-(4) would codify the

1 method of service for Board orders and the Board’s practice of setting a thirty-day deadline from  
2 the date of service for the payment of a monetary penalty imposed in a Board order.  
3 Alternatively, if the Board determines, after a hearing, that there is not sufficient evidence to  
4 determine that the respondent violated the applicable law, proposed Board Rules § 2-03(k) would  
5 explain that the respondent is sent the Board’s final decision in writing and that all materials  
6 remain confidential.

7 Throughout the formal proceedings phase, the attorneys in the Board’s advice unit act as  
8 counsel to the Board when the Board reviews the materials and makes its final determination.  
9 Thus, proposed Board Rules § 2-02(c) would preserve existing Board Rules 2-05(g) by  
10 prohibiting *ex parte* communications between the enforcement attorney and the Board’s advice  
11 attorneys regarding the merits of the enforcement action after formal proceedings are  
12 commenced.

13 **Text of Proposed Board Rules**

14 New material is underlined.

15 [Deleted material is in brackets.]

16  
17 **Chapter 2: Procedural Rules for Enforcement Actions**

18 **§ 2-01 Applicability and Definitions.**

19 (a) Applicability.

20 This chapter establishes the procedural rules for enforcement actions brought pursuant to Charter  
21 § 2603(h) to address alleged violations of: Chapter 68 of the New York City Charter, the  
22 Conflicts of Interest Law; § 3-224 through § 3-228 of the New York City Administrative Code,  
23 the Lobbyist Gift Law; § 3-901 through § 3-907 of the New York City Administrative Code, the

1 Affiliated Not-for-Profits Law; and § 3-1101 through § 3-1107 of the New York City  
2 Administrative Code, the Legal Defense Trusts Law.

3

4 (b) Definitions.

5 (1) The term “day” means a calendar day. When the last day of a time period is a  
6 Saturday, Sunday, or public holiday, the time period will run until the end of the next  
7 business day.

8 (2) The term “enforcement attorney” means any attorney prosecuting the enforcement  
9 action on behalf of the Board.

10 (3) The term “OATH” means the New York City Office of Administrative Trials and  
11 Hearings.

12 (4) The term “OATH Rules” means OATH’s Rules of Practice, as set forth in Title 48 of  
13 the Rules of the City of New York.

14 (5) The term “respondent” means a public servant, a former public servant, a lobbyist or  
15 any other person required to be listed on a statement of registration pursuant to New  
16 York City Administrative Code § 3-213(c)(1), an organization affiliated with an  
17 elected official, as defined by New York City Administrative Code § 3-901, an agent  
18 of an elected official, as defined by New York City Administrative Code § 3-901, or a  
19 legal defense trust, trustee, or beneficiary, as defined by New York City  
20 Administrative Code § 3-1101, who or that has been served a Notice of Initial  
21 Determination of Probable Cause.

22

23 **§ 2-02 Informal Proceedings.**

1 (a) Notice of Initial Determination of Probable Cause.

2 For the purposes of Charter § 2603(h)(1), the Board will commence an enforcement action by  
3 servicing a Notice of Initial Determination of Probable Cause by first class mail to the  
4 respondent's last known residential address or actual place of business.

5  
6 (b) Response to the Notice of Initial Determination of Probable Cause.

7 (1) For the purposes of Charter § 2603(h)(1), the respondent has twenty (20) days from  
8 the date of service to submit a written response to the Notice of Initial Determination  
9 of Probable Cause or request an extension. The response is an opportunity to explain,  
10 rebut, or provide information concerning the factual or legal allegations in the Notice.  
11 The Board will not consider requests for discovery of evidence during informal  
12 proceedings.

13 (2) Upon oral or written request within twenty (20) days from the date of service of the  
14 Notice, the respondent will be granted a thirty (30) day extension to submit a written  
15 response. Upon oral or written request made prior to the expiration of the first  
16 extension, the respondent will be granted a second thirty (30) day extension for good  
17 cause shown, including, but not limited to, ongoing settlement negotiations. Any  
18 further extensions must be requested in writing to the Board and will be granted only  
19 in exigent circumstances.

20 (3) For the purposes of Charter § 2603(h)(2):

21 (i) If the respondent submits a substantive written response to the Notice, the  
22 Board will review the response to determine whether there remains  
23 probable cause to believe that any alleged violation occurred and will

1                           either dismiss the enforcement action or sustain its initial determination of  
2                           probable cause in whole or in part.

3                   (ii) If the respondent does not submit a written response to the Notice or  
4                   submits only a general denial of the allegations in the Notice, the Board’s  
5                   initial determination of probable cause will be deemed sustained.

6  
7 (c) Referral to agency.

8 If the Board sustains its initial determination of probable cause against a respondent who has  
9 disciplinary rights as described in Charter § 2603(h)(2), the Board will notify the respondent’s  
10 employing City agency in writing of the alleged facts and violations.

11           (1) If the agency is not pursuing disciplinary action against the respondent, the Board will  
12           commence formal proceedings against the respondent.

13           (2) If the agency is pursuing disciplinary action against the respondent, the Board may  
14           resolve the enforcement action together with the agency. If the Board is unable to  
15           resolve the enforcement action together with the agency, the Board may commence  
16           formal proceedings against the respondent.

17  
18 (d) Representation by an attorney or other person.

19           (1) If the respondent elects to be represented by an attorney or any other person, the  
20           representative appearing for the respondent must submit a written notice of  
21           appearance to the Board. The appearance of a member in good standing of the bar of  
22           a court of general jurisdiction of any state or territory of the United States will be  
23           indicated by the designation “Attorney for (person represented).” The appearance of

1           any other person will be indicated by the designation “Representative for (person  
2           represented).” The Board will not accept a response from or discuss the details of an  
3           enforcement action with any attorney or other person who has not submitted a notice  
4           of appearance.

5           (2) To withdraw from representation, the representative must submit a written notice of  
6           withdrawal to the Board, signed by the respondent or otherwise explaining the reason  
7           for withdrawal. An attorney who has submitted a notice of appearance may withdraw  
8           from representation only with consent of the respondent or when other cause exists,  
9           as delineated in the applicable provisions of the New York Rules of Professional  
10           Conduct.

11           (3) A notice of appearance, withdrawal or substitution may be submitted to the Board at  
12           any time prior to commencement of formal proceedings. After the service of the  
13           Notice of Petition and Petition pursuant to Board Rules § 2-03(b)(1), the OATH  
14           Rules apply.

15  
16           (e) Stay of an enforcement action.

17           To obtain a stay of an enforcement action prior to commencement of formal proceedings, the  
18           respondent must submit a written request to the Board for its review and approval. After the  
19           service of the Notice of Petition and Petition pursuant to Board Rules § 2-03(b)(1), the OATH  
20           Rules apply.

21  
22           (f) Settlement.

1           (1) At any time after the service of the Notice of Initial Determination of Probable Cause,  
2           an enforcement action may be resolved by settlement agreement in the form of a  
3           Public Disposition or Public Warning Letter.

4           (i)   A Public Disposition must include an admission of the relevant facts; an  
5           acknowledgment that the admitted conduct violated a specific provision of  
6           the Conflicts of Interest Law, the Lobbyist Gift Law, the Affiliated Not-  
7           for-Profits Law, or the Legal Defense Trusts Law; and an appropriate  
8           penalty to address the admitted conduct.

9           (ii) A Public Warning Letter must include a statement of relevant facts, as  
10           understood by the Board, and a description of each violation of a specific  
11           provision of the Conflicts of Interest Law, the Lobbyist Gift Law, the  
12           Affiliated Not-for-Profits Law, or the Legal Defense Trusts Law.

13           (2) The language and penalty of the proposed settlement agreement will be negotiated  
14           between the enforcement attorney and the respondent or the respondent's  
15           representative, if applicable. If the respondent requests that the respondent's  
16           employing City agency be a party to the settlement, the respondent must submit a  
17           signed waiver of confidentiality to the Board to allow the enforcement attorney to  
18           discuss the proposed settlement agreement with the agency.

19           (3) If the enforcement attorney and the respondent reach a proposed settlement  
20           agreement, it will be reduced to writing and signed by the respondent, the  
21           respondent's representative, if applicable, and a representative of the respondent's  
22           employing City agency, if applicable. Any monetary penalty to be paid to the Board  
23           is due upon signing unless otherwise specified in the proposed settlement agreement.

1           Monetary penalty payments will be held by the Board in escrow until the proposed  
2           settlement agreement is fully executed by the Board.

3           (4) After receiving the full payment of any monetary penalty to be paid to the Board, the  
4           enforcement attorney will present the proposed settlement agreement to the Board for  
5           its review and approval.

6           (i)   If the Board approves the proposed settlement agreement, the settlement  
7           agreement will be signed by the Board Chair. The fully-executed  
8           settlement agreement will be made public, but all underlying records,  
9           reports, memoranda, and files of the enforcement action will remain  
10          confidential.

11          (ii)   If the Board does not approve the proposed settlement agreement, the  
12          Board may direct the enforcement attorney to seek modification of the  
13          penalty or the language in the settlement agreement. The modified  
14          proposed settlement agreement must be reviewed and approved by the  
15          Board.

16  
17    **§ 2-03 Formal Proceedings.**

18    (a) Designation of OATH.

19    For the purposes of Charter § 2603(h)(2), the Board designates OATH to conduct hearings in  
20    accordance with the OATH Rules, except as otherwise provided by these rules.

21

22    (b) Commencement of formal proceedings.

1           (1) The Board will commence formal proceedings at OATH by serving a Notice of  
2           Petition and Petition by certified mail, return receipt requested, and first class mail to  
3           the respondent's last known residential address or actual place of business and to the  
4           respondent's representative, if applicable. After service, the enforcement attorney will  
5           file the Notice of Petition and Petition with OATH and will provide OATH with  
6           potential dates for a settlement conference and potential dates for a hearing.

7           (2) After the conference and hearing dates have been scheduled at OATH, the  
8           enforcement attorney will serve a Notice of Hearing by certified mail, return receipt  
9           requested, and first class mail to the respondent's last known residential address or  
10           actual place of business and to the respondent's representative, if applicable.

11  
12   (c) Ex Parte communications with the Board.

13           (1) After service of the Notice of Petition and Petition pursuant to Board Rules § 2-  
14           03(b)(1), any Board attorney involved in the prosecution of the enforcement action  
15           may not communicate *ex parte* with any member of the Board or any attorney serving  
16           as counsel to the Board concerning the merits of the enforcement action, except as  
17           provided in paragraph (2) of this subdivision.

18           (2) An enforcement attorney may communicate *ex parte* with members of the Board or  
19           an attorney serving as counsel to the Board with respect to ministerial matters  
20           involving the enforcement action; on consent of the respondent or respondent's  
21           representative; or if deemed necessary by the Board or an attorney serving as counsel  
22           to the Board.

1 (d) Answer.

2 The respondent may serve and file a written answer to the Petition in accordance with the OATH  
3 Rules. The answer may contain specific responses, by admission, denial, or otherwise, to each  
4 allegation of the Petition and assert all affirmative defenses, if any. The respondent may include  
5 in the answer matters in mitigation. The answer must contain the full name, address, telephone  
6 number, and email address of the respondent. If the respondent is represented, the  
7 representative's name, address, telephone number and email address must also appear on the  
8 answer. The answer must be signed by the respondent or respondent's representative.

9

10 (e) Settlement.

11 At the OATH settlement conference, an enforcement action may be resolved by settlement  
12 agreement pursuant to Board Rules § 2-02(f).

13

14 (f) Hearing.

15 (1) The enforcement attorney will have the burden of proof by a preponderance of the  
16 evidence, which includes, but is not limited to, documents and testimony.

17 (2) The enforcement attorney will make an opening statement first, after which the  
18 respondent may make an opening statement.

19 (3) The enforcement attorney will initiate the presentation of evidence. After the  
20 enforcement attorney has completed the presentation of the Board's evidence, the  
21 respondent may present evidence. The enforcement attorney may present rebuttal  
22 evidence.

1           (4) The enforcement attorney will make a closing statement first, after which the  
2           respondent may make a closing statement.

3  
4           (g) OATH report.

5           After a hearing has been conducted, OATH will issue a confidential report of its recommended  
6           findings of fact and conclusions of law and its recommended disposition of the enforcement  
7           action. OATH will send the report, along with the original transcript of the hearing and all  
8           documents introduced into the record, to the Board for review. OATH will send a copy of the  
9           report to the enforcement attorney and the respondent or respondent's representative, if  
10           applicable.

11  
12           (h) Comment on OATH report.

13           Within twenty (20) days from the date of the OATH report, each party may submit a comment to  
14           the Board. The comment is an opportunity to explain, rebut, or provide information concerning  
15           OATH's recommended findings of fact, conclusions of law, and disposition. If either party  
16           submits a comment, the opposing party may submit to the Board a response to the comment  
17           within thirty (30) days from the date of the OATH report. Copies of all such submissions must be  
18           shared with the opposing party. The Board will not consider any new evidence submitted in a  
19           comment or in a response to a comment.

20  
21           (i) Final review by the Board.

22           For the purposes of Charter § 2603(h)(3), the Board will review the OATH report, along with the  
23           original transcript of the hearing and all documents introduced into the record, and any

1 comments and responses to comments submitted to the Board pursuant to Board Rules § 2-03(h),  
2 to determine whether it has been proven by a preponderance of the evidence that the respondent  
3 violated a provision of the Conflicts of Interest Law, the Lobbyist Gift Law, the Affiliated Not-  
4 for-Profits Law, or the Legal Defense Trusts Law. In accordance with Board Rules § 2-03(c),  
5 any Board attorney involved in the prosecution of the enforcement action will not participate in  
6 the Board's final review.

7

8 *(j) Board order finding a violation.*

9 (1) If the Board determines that it has been proven by a preponderance of the evidence  
10 that the respondent violated a provision of the Conflicts of Interest Law, the Lobbyist  
11 Gift Law, the Affiliated Not-for-Profits Law, or the Legal Defense Trusts Law, the  
12 Board will issue an order stating its final findings of fact and conclusions of law and  
13 imposing a penalty, except, if the respondent is a current Member or employee of the  
14 New York City Council, the Board will issue an order stating its final findings of fact  
15 and conclusions of law and recommending a penalty to the New York City Council.  
16 The order will include notice of the respondent's right to appeal to the New York  
17 State Supreme Court.

18 (2) All orders of the Board will be made public. The Board may also make the OATH  
19 report public as part of its order, but all other underlying records, reports,  
20 memoranda, and files will remain confidential.

21 (3) The order will be sent by first class mail to the respondent's last known residential  
22 address or actual place of business and to the respondent's representative, if  
23 applicable.

1           (4) If the order imposes a monetary penalty, payment is due to the Board within thirty  
2           (30) days of the date of service. If the respondent does not pay the full monetary  
3           penalty amount, the Board will refer the matter to the New York City Law  
4           Department for collection.

5  
6 (k) Board dismissal.

7 If the Board determines that it has not been proven by a preponderance of the evidence that the  
8 respondent violated any provision of the Conflicts of Interest Law, the Lobbyist Gift Law, the  
9 Affiliated Not-for-Profits Law, or the Legal Defense Trusts Law, the Board will issue a written  
10 decision that dismisses the enforcement action and states its final findings of fact and  
11 conclusions of law. The decision will be sent to the respondent and respondent's representative,  
12 if applicable, and will not be made public. All underlying records, reports, memoranda, and files  
13 will remain confidential.

14  
15  
16 **[Chapter 2: Procedural Rules for Hearings.**

17 **§2-01 Initial Determination**

18 **§2-02 Commencement of Formal Proceedings and Pleadings**

19 **§2-03 Hearing**

20 **§2-04 Decisions and Orders**

21 **§2-05 General Matters**

22  
23 **§2-01 Initial Determination.**

1 (a) *Notice.*

2 If the Board makes an initial determination, based on a complaint, investigation, or other  
3 information available to the Board, that there is probable cause to believe that a public servant  
4 (which for purposes of Charter §2603(h) includes a former public servant) has violated a  
5 provision of Chapter 68 of the City Charter, the Board shall notify the public servant of its  
6 determination in writing. The notice shall contain a statement of the facts upon which the Board  
7 relied for its determination of probable cause and a statement of the provisions of law allegedly  
8 violated. The notice shall afford the public servant an opportunity, either orally or in writing, to  
9 respond to, explain, rebut, or provide information concerning the allegations in such notice  
10 within fifteen days of service of the notice. The notice shall also inform the public servant of his  
11 or her right to be represented by counsel or any other person, and shall include a copy of the  
12 Board's procedural rules. A notice of initial determination shall not be required in a proceeding  
13 brought pursuant to Section 12-110 of the Administrative Code.

14

15 (b) *Request for a stay.*

16 In response to the Board's notice, the public servant may apply to the Board for a stay of the  
17 proceedings, for good cause shown. The Board may grant or deny such request in its sole  
18 discretion.

19

20 (c) *Admission of facts.*

21 If, in response to the Board's notice, the public servant admits to the facts contained therein or to  
22 a violation of the provisions of Chapter 68 of the City Charter and elects to forgo a hearing, the  
23 Board may, after consulting with the head of the agency served or formerly served by the public

1 servant, or, in the case of an agency head, after consulting with the Mayor, issue an order finding  
2 a violation and imposing the penalties it deems appropriate under Chapter 68 of the City Charter,  
3 provided, however, that pursuant to Charter §2603(h)(3), the Board shall not impose penalties  
4 against members of the City Council, or public servants employed by the City Council or by  
5 members of the City Council, but may recommend to the City Council such penalties as the  
6 Board deems appropriate. When a penalty is recommended, the City Council shall report to the  
7 Board what action was taken.

8

9 *(d) No probable cause finding.*

10 If, after receipt of the public servant's response, the Board determines that there is no probable  
11 cause to believe that a violation has occurred, the Board shall dismiss the matter and inform the  
12 public servant in writing of its decision.

13

14 **§2-02 Commencement of Formal Proceedings and Pleadings.**

15 *(a) Determination of probable cause.*

16 If, after consideration of the public servant's response, the Board determines that there remains  
17 probable cause to believe that a violation of the provisions of Chapter 68 of the City Charter has  
18 occurred, and the public servant has not elected to forgo the hearing, the Board shall hold or  
19 direct a hearing to be held on the record to determine whether such violation has occurred.

20 If the public servant is subject to the jurisdiction of a state law provision or collective bargaining  
21 agreement which provides for the conduct of a disciplinary hearing by another body, the Board  
22 shall refer the matter to the appropriate entity. The hearing shall be conducted in accordance with  
23 the rules of that entity.

1 The Board may also refer a matter to the public servant's agency if the Board deems the violation  
2 to be minor or if other disciplinary charges are pending there against the public servant.

3

4 (b) *Petition.*

5 The Board shall institute formal proceedings by serving a petition on the public servant. The  
6 petition shall set forth the facts which, if proved, would constitute a violation of Chapter 68 of  
7 the City Charter or Section 12-110 of the Administrative Code, as well as the applicable  
8 provisions thereof which are alleged to have been violated. The petition shall also advise the  
9 public servant of the public servant's rights to file an answer, to a hearing, to be represented at  
10 such hearing by counsel or any other person, and to cross-examine witnesses and present  
11 evidence.

12

13 (c) *Answer.*

14 (1) *General rule.*

15 The public servant shall answer the petition by serving an answer on the Board within  
16 eight days after service of the petition, unless a different time is fixed by the Board. The  
17 public servant shall serve the answer personally or by certified or registered mail, return  
18 receipt requested.

19

20 (2) *Form and contents of answer.*

21 The answer shall be in writing and shall contain specific responses, by admission, denial,  
22 or otherwise, to each allegation of the petition and shall assert all affirmative defenses, if  
23 any. The public servant may include in the answer matters in mitigation. The answer shall

1           be signed and shall contain the full name, address, and telephone number of the public  
2           servant. If the public servant is represented, the representative's name, address, and  
3           telephone number shall also appear on the answer, which shall be signed by either the  
4           public servant or by his or her representative.

5

6           (3) *Effect of failure to answer.*

7           If the public servant fails to serve an answer, all allegations of the petition shall be  
8           deemed admitted and the Board shall proceed to hold a hearing in which prosecuting  
9           counsel shall submit for the record an offer of proof establishing the factual basis on  
10          which the Board may issue an order. If the public servant fails to respond specifically to  
11          any allegation or charge in the petition, such allegation or charge shall be deemed  
12          admitted.

13

14          (d) *Amendment of pleadings.*

15          Pleadings shall be amended as promptly as possible upon conditions just to all parties. If a  
16          pleading is to be amended less than twenty-five days before the commencement of the hearing,  
17          the amendment may be made only on consent of the parties or by leave of the Board, if the Board  
18          is conducting the hearing, or by leave of a Board member or Administrative Law Judge, if the  
19          Board member or Administrative Law Judge is conducting the hearing.

20

21          **§2-03 Hearing.**

22          (a) *Conduct of hearings generally.*

1 Hearings shall be conducted by the Board or, upon designation by the Board, by a member of the  
2 Board or the Chief Administrative Law Judge of the Office of Administrative Trials and  
3 Hearings (OATH), or such administrative law judge (ALJ) as the Chief Administrative Law  
4 Judge shall assign.

5

6 (b) *Subpoenas.*

7 Subpoenas requiring the attendance of a witness and subpoenas *duces tecum* requiring the  
8 production of books, papers, and other things may be issued only by (i) the Administrative Law  
9 Judge, where the hearing has been referred to OATH, or (ii) a member of the Board, where the  
10 hearing is conducted by the Board or by a member of the Board, upon application of a party or  
11 upon the Administrative Law Judge's or the Board member's own motion. In addition to or in  
12 lieu of these subpoenas, the Administrative Law Judge or the Board member may also issue an  
13 order directing the party or person under the control of a party to attend or produce.

14

15 (c) *Conduct of hearings by OATH.*

16 If the Board refers a hearing to OATH, a copy of the petition shall also be sent to OATH at the  
17 time the public servant is served with the petition. OATH shall conduct the hearing in  
18 accordance with its rules, as set forth in Title 48 of the Rules of the City of New York, except as  
19 otherwise provided by these Rules.

20

21 (d) *Conduct of hearings by the Board or by a Board member.*

22 (1) *Generally.*

1           The Board may hear a case or may designate a member of the Board to hear a case, make  
2           findings of fact and conclusions of law, preside over pre-hearing matters and  
3           adjournments, and make recommendations to the Board for the proposed disposition of  
4           the proceeding. When a hearing is conducted by the Board, the hearing shall be presided  
5           over by the Board's Chair or by his or her designee. The Board or Board member shall  
6           conduct the hearing, including such pre-hearing matters as conferences, discovery, and  
7           motion practice, in conformance with the rules and procedures of OATH, as set forth in  
8           Title 48 of the Rules of the City of New York, except as otherwise provided by these  
9           rules.

10  
11           *(2) Disposition conferences and agreements.*

12           If disposition of the proceeding is to be discussed at a conference, the Board shall  
13           designate an individual, other than a Board member participating in the hearing, to  
14           conduct the conference. During disposition discussions, upon notice to the parties, the  
15           person conducting the conference may confer with each party and/or representative  
16           separately. Board members shall not be called to testify in any proceeding concerning  
17           statements made at a disposition conference.

18  
19           *(3) Order of proceedings.*

20           Prosecuting counsel shall have the burden of proof by the preponderance of the evidence,  
21           shall initiate the presentation of evidence, and may present rebuttal evidence. The public  
22           servant may introduce evidence after prosecuting counsel has completed his or her case.  
23           Opening statements, if any, shall be made first by prosecuting counsel. Closing

1 statements, if any, shall be made first by the public servant. This order of proceedings  
2 may be modified at the discretion of the Board or Board member.

3

4 **§2-04 Decisions and Orders.**

5 (a) *Report to the Board.*

6 When a hearing has been conducted by either OATH or a member of the Board designated to  
7 hear the case, a report of recommended findings of fact and conclusions of law and  
8 recommendations for the disposition of the proceeding shall be issued and forwarded, along with  
9 the original transcript of the proceeding and all documents introduced into the record, to the  
10 Board for review and final action. The report shall not be made public. A copy of the report and  
11 recommendation shall be sent to all parties and their counsel or other representative in order to  
12 afford them the opportunity to comment before final action is taken by the Board. If prosecuting  
13 counsel or the public servant wishes to comment, he or she shall do so within ten days of service  
14 of the report and recommendation.

15

16 (b) *Finding of violation.*

17 If after the hearing and upon a consideration of all the evidence in the record of hearing,  
18 including comments, the Board finds that a public servant has engaged in conduct prohibited by  
19 Chapter 68 of the City Charter, the Board shall consult with the head of the agency served or  
20 formerly served by the public servant, or in the case of an agency head, consult with the Mayor.  
21 Where the Board finds a violation of Chapter 68 or section 12-110 of the Administrative Code,  
22 the Board shall state its final findings of fact and conclusions of law and issue an order imposing  
23 any penalties it deems appropriate under either statute. The order shall include notice of the

1 public servant's right to appeal to the New York State Supreme Court. Alternatively, in the case  
2 of a violation of Chapter 68, the Board may state its findings and conclusions and recommend a  
3 penalty, if any, to the head of the agency served by the public servant or former public servant  
4 or, in the case of an agency head or former agency head, to the Mayor. Pursuant to Charter  
5 §2603(h)(3), the Board shall not impose penalties against members of the City Council, or public  
6 servants employed by the City Council or by members of the City Council, but may state its  
7 findings and conclusions and recommend to the City Council such penalties as the Board deems  
8 appropriate. When a penalty is recommended, the head of the agency, Mayor, or City Council  
9 shall report to the Board what action was taken.

10

11 *(c) Consultation by agency.*

12 In instances where the Board does not hold a hearing and instead refers a matter to the public  
13 servant's agency, that agency shall consult with the Board prior to issuing its final decision.

14

15 *(d) Dismissals.*

16 If, after the hearing and upon consideration of the record, the Board finds that a public servant  
17 has not engaged in acts prohibited by Chapter 68 of the City Charter or section 12-110 of the  
18 Administrative Code, the Board shall state its findings of facts and conclusions of law and shall  
19 issue an order dismissing the petition. The order shall not be made public.

20

21 **§2-05 General Matters.**

22 *(a) Appearances before the Board.*

1 (1) A party may appear before the Board in person, by an attorney, or by a duly  
2 authorized representative. The person appearing for the party shall file a notice of  
3 appearance with the Board. The filing of any papers by an attorney or other  
4 representative who has not previously appeared shall constitute the filing of a notice of  
5 appearance by that person and shall conform to the requirements of paragraphs (2) and  
6 (4) of this subdivision.

7 (2) The appearance of a member in good standing of the bar of a court of general  
8 jurisdiction of any state or territory of the United States shall be indicated by the suffix  
9 "Esq." and the designation "Attorney for (person represented)." The appearance of any  
10 other person shall be indicated by the designation "Representative for (person  
11 represented)."

12 (3) Absent extraordinary circumstances, no application shall be made or argued by any  
13 attorney or other representative who has not filed a notice of appearance.

14 (4) A person may not file a notice of appearance on behalf of a party unless the person  
15 has been retained by that party to represent the party before the Board. Filing a notice of  
16 appearance constitutes a representation that the person appearing has been so retained.

17  
18 (b) *Withdrawal and substitution of counsel.*

19 (1) An attorney who has filed a notice of appearance shall not withdraw from  
20 representation without the permission of the Board, upon application. Withdrawals shall  
21 not be granted unless upon consent of the client or when other cause exists, as delineated  
22 in the applicable provisions of the Code of Professional Responsibility.<sup>1</sup>

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<sup>1</sup> Now the Rules of Professional Conduct

1 (2) Notices of substitution of counsel served and filed more than twenty days prior to a  
2 hearing before the Board or before a member of the Board may be filed without leave of  
3 the Board or Board member. Notices of substitution of counsel served and filed less than  
4 twenty-one days prior to a hearing before the Board or before a member of the Board  
5 may be filed only with the permission of the Board or Board member, which permission  
6 shall be freely given, absent prejudice or substantial delay of the proceedings.

7  
8 (c) *Service of petition by Board.*

9 A petition shall be served on the public servant

10 (i) in the manner provided in Section 312-a, or subdivisions 1, 2, or 4 of Section

11 308, of the New York Civil Practice Law and Rules for service of a summons or

12 (ii) by both certified mail, return receipt requested, and first class mail to the  
13 public servant's last known residence or actual place of business or

14 (iii) in such manner as the Board directs, if service is impracticable under  
15 paragraphs (i) and (ii) of this subdivision, or

16 (iv) in any manner agreed upon by counsel to the Board and the public servant or  
17 his or her representative.

18  
19 (d) *Service of other documents by Board.*

20 Notices, orders, and all other documents, except petitions and subpoenas, originating with the  
21 Board shall be served on the public servant

22 (1) by personal delivery to the public servant or

- 1           (2) by first class mail to the public servant's last known residence or actual place of  
2           business or
- 3           (3) by overnight delivery service to the public servant's last known residence or actual  
4           place of business or
- 5           (4) by telephonic facsimile (FAX) or similar transmission or
- 6           (5) by leaving the paper at the public servant's last known residence with a person of  
7           suitable age and discretion or
- 8           (6) in such manner as the Board directs, if service is impracticable under paragraphs (1),  
9           (2), (3), (4), or (5) of this subdivision, or
- 10          (7) in any manner agreed upon by counsel to the Board and the public servant or his or  
11          her representative. Where the public servant has appeared by a representative, all  
12          papers served by the Board subsequent to that appearance shall be served upon the  
13          representative by one of the methods provided in paragraphs (1)-(7) of this  
14          subdivision.

15

16   (e) *Computation of time.*

17   The computation of any time period referred to in these rules shall be calculated in calendar  
18   days, except that when the last day of the time period is a Saturday, Sunday, or public holiday,  
19   the period shall run until the end of the next following business day. Where a period of time  
20   prescribed by the rules set forth in this chapter is measured from the service of a paper and  
21   service of that paper is made in the manner provided by paragraph (ii) of subdivision (c) or  
22   paragraph (2) of subdivision (d) of this section, five days shall be added to the prescribed period.

23

1 (f) *Confidentiality.*

2 All matters relating to complaints submitted to or inquired into by the Board, or any action taken  
3 by the Board in connection therewith or hearings conducted by the Board or OATH, shall be  
4 kept confidential unless the public servant waives confidentiality and the Board determines that  
5 confidentiality is not otherwise required. Hearings conducted by the Board or by OATH shall be  
6 public if requested by the public servant. Final findings, conclusions, and orders issued upon a  
7 violation of Chapter 68 shall be made public.

8

9 (g) *Ex Parte communications with Board.*

10 (1) After service of the petition in a case, counsel conducting the prosecution of the case  
11 on behalf of the Board shall not communicate *ex parte* with any member of the Board  
12 concerning the merits of the case, except as provided in paragraph (2) of this subdivision.

13 (2) Counsel conducting the prosecution of a case on behalf of the Board may  
14 communicate *ex parte* with the Board, or any member thereof, with respect to ministerial  
15 matters involving the case or on consent of the respondent or respondent's counsel or in  
16 an emergency.

17

18 (h) *Disposition by agreement.*

19 At any time after the service of a notice of probable cause in a proceeding brought pursuant to  
20 Chapter 68 or at any time after service of a petition in a proceeding brought pursuant to Section  
21 12-110 of the Administrative Code, the public servant and the Board may agree to dispose of the  
22 case by agreement. For this purpose, the Board or any Board member designated by the Board  
23 may conduct a disposition conference, provided that, when the Board or a member of the Board

1 conducts or is to conduct the hearing, the Board shall comply with the requirements of section 2-  
2 03(d)(2). All offers of disposition, whether made at a conference, hearing, or otherwise, shall be  
3 confidential and shall be inadmissible at trial of any case. If a disposition by agreement is  
4 reached, it shall be reduced to writing and signed by the public servant or his or her  
5 representative and the Board or, in the discretion of the Board, placed on the record. When a  
6 disposition by agreement contains an acknowledgment that a public servant's conduct has  
7 violated a provision of Chapter 68 of the City Charter or Section 12-110 of the Administrative  
8 Code, that disposition by agreement shall be made public by the Board.

9

10 (i) *OATH rules.*

11 In the event of any inconsistency between these rules and the rules of the Office of  
12 Administrative Trials and Hearings, these rules shall govern.]