

September 21, 2018, Agenda – Open Meeting Matter

To: The Board
From: Chad H. Gholizadeh
Date: September 7, 2018 *CHG*
Re: Proposed Board Rule: Work for Not-For-Profits

As part of its review of the Board's existing rules, practices, and advisory opinions, Staff has identified the issue of public servants' official work on behalf of private not-for-profits as an area where it would be helpful to encapsulate the Board's thinking and practice into a new Board Rule. This new Board Rule would: (a) establish a process by which an agency head may designate an agency employee to perform work on behalf of a not-for-profit as part of the employee's regular City duties, which would not require Board approval; (b) establish a process by which public servants designated to work on behalf of not-for-profits having City business dealings may receive approval to be involved in those business dealings, which would require Board approval; and (c) require public disclosure of all such designations.

Staff has consulted informally with the New York City Law Department about the proposed Board Rule and, with the Board's approval, will formally submit the Rule to the Law Department and Mayor's Office of Operations, as required by the City Administrative Procedure Act. See Charter § 1043(d).

Attached are the following:

- 1) Proposed Board Rule and Commentary (**Exhibit 1**); and
- 2) Proposed Board Rule without Commentary (**Exhibit 2**).

Analysis & Discussion

The proposed Rule was developed to address the increasingly common practice of public servants, as part of their City jobs, serving as staff or board members of private not-for-profits or providing them other kinds of technical, fundraising, or logistical services. Public servants' use of City time and their City titles, staff, and/or resources to do work for not-for-profits, as well as their involvement with the City business of these not-for-profits, implicate several provisions of Chapter 68. City Charter § 2604(b)(2) prohibits public servants from engaging in any conduct which conflicts with the proper discharge of their official duties.¹ The Charter Revision Commission, in commenting on this provision at the time it was under consideration, stated that it had

retained this “catch-all” prohibition in recognition of the fact that the specific prohibitions set forth in [Chapter 68] cannot address all conflict of interest situations which may arise in the future and that the [Conflicts of Interest] [B]oard must retain the flexibility to handle new situations as they arise.

Volume II, Report of the New York City Charter Revision Commission, December 1986 – November 1988, at 175.

In 1998 the Board promulgated Board Rules § 1-13, enunciating specific activities which would be prohibited by City Charter § 2604(b)(2). Board Rules §§ 1-13(a) and 1-13(b) prohibit any use of City time and City resources on activities for a public servant's private interests.²

¹ Charter § 2604(b)(2) provides that: “No public servant shall engage in any business, transaction or private employment, or have any financial or other private interest, direct or indirect, which is in conflict with the proper discharge of his or her official duties.”

² Board Rules § 1-13(a) provides that: “Except as provided in subdivision (c) of this section, it shall be a violation of City Charter §2604(b)(2) for any public servant to pursue personal and private activities during times when the public servant is required to perform services for the City.”

Board Rules § 1-13(b) provides that: “Except as provided in subdivision (c) of this section, it shall be a violation of City Charter §2604(b)(2) for any public servant to use City letterhead, personnel, equipment, resources, or supplies for any non-City purpose.”

Board Rules § 1-13(c) permits City employees to engage in personal and private activities using City time and City resources, but not City letterhead, upon a written application by the agency head if the Board determines that the activity furthers the purposes and interests of the City.³ This provision exists because in some situations a public servant's private activities provide an incidental benefit to the City. *See* Notice of Adoption of Rule Identifying Certain Conduct Prohibited by Charter § 2604(b)(2) (“For example, a public servant’s uncompensated participation on a bar association committee not only may help the public servant meet his or her obligations to the profession but may reflect favorably upon the City and the public servant’s agency, may assist in the professional development of the public servant, and may provide him or her with new insights into the performance of his or her City job, all to the City’s benefit.”). In its Advisory Opinion No. 2001-3, the Board acknowledged these benefits, noting among the benefits of public servants engaging in, for example, pro bono legal services to be “skills training and professional development, public esteem for the legal profession, attorney job satisfaction, and generally a more efficient use of legal resources.” Advisory Opinion No. 2001-3 at 8-9.

Staff has identified a noticeable and widening regulatory gap that exists between public servants’ personal and private activities, like pro bono legal work addressed by Board Rules § 1-

³ Board Rules § 1-13(c) provides that:

- (1) A public servant may pursue a personal and private activity during normal business hours and may use City equipment, resources, personnel, and supplies, but not City letterhead, if
 - (i) the type of activity has been previously approved for employees of the public servant’s agency by the Conflicts of Interest Board, upon application by the agency head and upon a determination by the Board that the activity furthers the purposes and interests of the City; and
 - (ii) the public servant shall have received approval to pursue such activity from the head of his or her agency.
- (2) In any instance where a particular activity may potentially directly affect another City agency, the employee must obtain approval from his or her agency head to participate in such particular activity. The agency head shall provide written notice to the head of the potentially affected agency at least 10 days prior to approving such activity.”

13(c), and an expanding set of activities which, while not personal and private, are also not, strictly speaking, City work. Public servants have repeatedly sought advice from the Board on the best way to reconcile the prohibition on the use of City time and City resources for non-City activities with: (i) sitting on the board of a not-for-profit which promotes an issue relevant to the public servant's City work and taking on other responsibilities on behalf of the not-for-profit; (ii) sitting on a professional association committee to advocate for adoption of policies which the public servant's City agency believes are beneficial; and (iii) providing analysis and support to a not-for-profit as part of that not-for-profit's advocacy on issues related to the City's policy goals. In each of these situations, an agency has determined that the activity is in the City's interest and directed the public servant to engage in these activities, but a public servant's use of City time and City resources to do work specifically advancing the interests and for the benefit of the not-for-profit would be prohibited by Board Rules §§ 1-13(a) and 1-13(b). The mechanism currently available under § 1-13(c) does not apply because the proposed involvement in a not-for-profit's activities are not the "personal and private" activities of the public servant, but rather work given to the public servant as part of his or her City job.

In Advisory Opinion No. 1999-1, the Board engaged in an early attempt to bridge this divide. When faced with an inquiry as to how elected officials could use City time and City resources in the course of serving as *ex officio* members of not-for-profit boards, the Board advised that elected officials could designate in writing members of their staff to attend board meetings and participate in the not-for-profit's governance. See Advisory Opinion No. 1999-1 at 4-5. This mechanism, however, fails to address the challenges faced by the vast majority of public servants engaged in similar activities because it is expressly limited to elected officials. Additionally, Advisory Opinion No. 1999-1 failed to provide a robust mechanism for addressing

the more serious conflicts of interest that may arise when public servants are involved in the City business of the not-for-profit on whose behalf they are working as part of their City jobs.

Building on the mechanism first envisioned in Advisory Opinion No. 1999-1, and in order to provide a clear path to compliance with Chapter 68 for public servants engaged in such activities, Staff proposes a new subdivision (e) of § 1-13. The proposed Board Rules § 1-13(e) provide a clear means for a public servant, at the direction of his or her agency head, to use City time and City resources in support of a not-for-profit entity that, among its other purposes, serves a City purpose as part of his or her City agency responsibilities. Board Rules § 1-13(e)(1) permits an agency head or elected official to designate a public servant in his or her agency or office to perform work on behalf of a not-for-profit corporation as part of their regular City duties, without the need to request a waiver. In the event the agency head or elected official would want the designated public servant to be involved in the business dealings between the not-for-profit and the City, proposed Board Rules § 1-13(e)(2) permits the agency head or elected official to submit a request for that public servant's involvement to the Board for its approval.

In either a designation pursuant to proposed Board Rules § 1-13(e)(1) or an application for Board approval pursuant to proposed Board Rules § 1-13(e)(2), an agency head or elected official would be required to state that there is a demonstrable nexus between the proposed work on behalf of a not-for-profit, the public servant's City job, and the mission of the public servant's agency and that such work furthers the agency's mission and is not undertaken primarily for the benefit or interests of the not-for-profit. The proposed subdivision (e)(3) defines who may submit designations and requests in a manner similar to the waiver provisions of Charter § 2604(e), with the exception of elected officials who, in light of their unique roles and positions in

City government, may designate or approve such participation for themselves and members of their staff.

Recommendation

Staff recommends that the Board approve the proposed Board Rule and Commentary for submission to the Law Department and the Mayor's Office of Operations for review and approval pursuant to Charter § 1043(d).

New York City Conflicts of Interest Board

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Notice of Public Hearing and Opportunity to Comment on Proposed Rule Regarding Work for Not-For-Profit Entities

What are we proposing? The Conflicts of Interest Board intends to amend its rules by creating a procedure whereby agency heads may designate public servants to perform work on behalf of not-for-profit organizations and, with the approval of the Conflicts of Interest Board, participate in such organizations' business dealings with the City.

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 [] at Rules@COIB.nyc.gov.
- **Mail.** You can mail comments to Chad H. Gholizadeh, 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 **What authorizes the Conflicts of Interest Board to make this rule?** Sections 1043 and 2603(a) of
2 the City Charter and authorize the Conflicts of Interest Board to make this proposed rule. This proposed
3 rule was not included in the Conflicts of Interest Board’s regulatory agenda for this Fiscal Year because
4 it was not contemplated when the Conflicts of Interest Board published the agenda.

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

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

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13 STATEMENT OF BASIS AND PURPOSE

14 New York City Charter § 2604(b)(2) provides that “[n]o public servant shall engage in
15 any business, transaction, or private employment, or have any financial or other private interest,
16 direct or indirect, which is in conflict with the proper discharge of his or her official duties.”

17 The Charter Revision Commission, in commenting on this provision at the time it was
18 under consideration, stated that it had

19 retained this “catch-all” prohibition in recognition of the fact that the
20 specific prohibitions set forth in [Chapter 68] cannot address all conflict
21 of interest situations which may arise in the future and that the [Conflicts
22 of Interest] [B]oard must retain the flexibility to handle new situations as
23 they arise.

24 Volume II, Report of the New York City Charter Revision Commission,
25 December 1986 – November 1988, at p. 175.

26 Another provision of Charter Chapter 68, § 2603(a), sets forth the Board’s general
27 rulemaking authority, and provides that “[t]he [B]oard shall promulgate rules as are necessary to
28 implement and interpret the provisions of this chapter, consistent with the goal of providing clear
29 guidance regarding prohibited conduct.”

30 In 1998, after numerous requests for advice and enforcement actions, the Board
31 promulgated rules implementing Charter § 2604(b)(2), set forth in Board Rules § 1-13 (“Conduct
32 Prohibited by City Charter § 2604(b)(2)”), identifying what sorts of activities would present a

1 conflict with the proper discharge of a public servant’s official duties. In its rules, the Board
2 prohibits a public servant from “pursu[ing] personal and private activities during times when the
3 public servant is required to perform services for the City” and from “us[ing] City letterhead,
4 personnel, equipment, resources, or supplies for any non-City purpose.” Board Rules §§ 1-13(a)
5 and (b). These rules prohibit any use of City time and City resources on activities for a public
6 servant’s private interests.

7 The Board’s Rules currently permit City employees to engage in personal and private
8 activities using City time and City resources, but not letterhead, upon a written application by the
9 agency head if the Board determines that the activity furthers the purposes and interests of the
10 City. See Board Rules § 1-13(c). This provision exists because in some situations a public
11 servant’s private activities provide an incidental benefit to the City. *See* Notice of Adoption of
12 Rule Identifying Certain Conduct Prohibited by Charter § 2604(b)(2), Statement of Basis and
13 Purpose of Rule at 3; *see also* Advisory Opinion No. 2001-3 at 8-9 (noting “skills training and
14 professional development, public esteem for the legal profession, attorney job satisfaction, and
15 generally a more efficient use of legal resources” as benefits of *pro bono* work by government
16 attorneys, an example of such outside activity).

17 In the time since the Board promulgated Board Rules § 1-13, many public servants have
18 requested advice about holding positions with firms or engaging in activities which, while not
19 personal and private activities as described above, are also not strictly speaking City work. For
20 example, a public servant may be asked to sit on the board of a not-for-profit which promotes an
21 issue relevant to the public servant’s City work but in the course of that board service take on
22 other responsibilities on behalf of the not-for-profit. Or a public servant could be asked by her
23 supervisor to accept offers to sit on a professional association committee to advocate for

1 adoption of policies which the public servant's City agency believes are beneficial. Another
2 example is the public servant who may be asked to provide analysis and support to a not-for-
3 profit as part of that not-for-profit's advocacy on issues related to the City's policy goals. In
4 each of these situations, an agency has determined that the activity is in the City's interest and is
5 also part of the public servant's City job.

6 However, a public servant's use of City time and City resources to work on behalf of the
7 not-for-profit would be prohibited by Board Rules §§ 1-13(a) and 1-13(b), which forbid public
8 servants from using City time or City resources for the work of these non-City entities. Under
9 current rules, the mechanism made available by §1-13(c) would not apply because the proposed
10 involvement in a not-for-profit's activities are not the "personal and private" activities of the
11 public servant, but rather the work of the public servant's City agency.

12 These inquiries have arisen with more frequency because, in recent years, City agencies
13 have increasingly made use of and relied upon not-for-profit entities to implement policies and
14 projects that serve the City and its residents. Public servants often serve as staff or board
15 members of these not-for-profit entities or provide other kinds of technical, fundraising, or
16 logistical services to the not-for-profits. In the course of this work, public servants' use of City
17 time and their City titles, staff, and/or resources, as well as some of their involvement with the
18 City business of these not-for-profits, implicate several provisions of Chapter 68.

19 Many of these not-for-profits have business dealings with the City, as defined in Charter
20 § 2601(8) (including "any transaction with the city involving the sale, purchase, rental,
21 disposition or exchange of any goods, services, or property, any license, permit, grant or benefit,
22 and any performance of or litigation with respect to any of the foregoing, but shall not include
23 any transaction involving a public servant's residence or any ministerial matter"). Examples of

1 such business dealings include, but are not limited to, the following scenarios: contracting with
2 the City to provide services related to a City program; selling training and educational materials
3 to City agencies for use by public servants; applying for and receiving funds from City agencies;
4 applying for permits from City agencies; and leasing space from the City. Some of the public
5 servants working with these entities might have duties involving such business dealings, and a
6 mechanism should be available to address these situations.

7 This proposed rule amendment, a new subdivision (e) of § 1-13, would provide a means
8 for a public servant, at the direction of his or her agency head, to use City time and City
9 resources in support of a not-for-profit entity that, among its other purposes, serves a City
10 purpose as part of his or her City agency responsibilities. Specifically, this Rule would: (a)
11 establish a process by which an agency head may designate a public servant to perform work on
12 behalf of a not-for-profit corporation as part of their regular City duties, which in and of itself
13 would not require a Board waiver; (b) provide a process by which public servants designated to
14 work on behalf of not-for-profits having City business dealings may receive approval to be
15 involved in the business dealings between those not-for-profits and the City, requiring Board
16 approval; and (c) require public disclosure of all such designations.

17 In either a designation pursuant to proposed Board Rules § 1-13(e)(1) or an application
18 for Board approval pursuant to proposed Board Rules § 1-13(e)(2), an agency head would be
19 required to state that there is a demonstrable nexus between the proposed work on behalf of a
20 not-for-profit, the public servant's City job, and the mission of the public servant's agency and
21 that such work furthers the agency's mission and is not undertaken primarily for the benefit or
22 interests of the not-for-profit. The proposed subdivision (e) would define who may submit
23 designations and requests in a manner similar to the waiver provisions of Charter § 2604(e), with

1 the exception of elected officials who, in light of their unique roles and positions in City
2 government, may designate or approve themselves and members of their staff. For the purposes
3 of this rule, members of an elected official's staff would include the Councilmanic aides in the
4 office of a City Councilmember.

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6 **Text of the Proposed Rule**

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8 New material is underlined.

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Section 1. Subdivision (e) of Chapter 1 of Title 53 of the Rules of the City of New York
is re-lettered as subdivision (f).

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§ 2. Section 1-13 of Chapter 1 of Title 53 of the Rules of the City of New York is
amended by adding a new subdivision (e), to read as follows:

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§ 1-13. Conduct Prohibited by City Charter § 2604(b)(2).

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(e) (1) A public servant may be designated by their agency head to perform work on
behalf of a not-for-profit corporation, association, or other such entity that operates on a not-for-
profit basis, including serving as a board member or other position with fiduciary
responsibilities, and may utilize City equipment, resources, personnel, supplies, and title, but not
City letterhead, as part of that work if:

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(a) there is a demonstrable nexus between the proposed activity, the public servant's City
job, and the mission of the public servant's agency; and that such work furthers the agency's
mission and is not undertaken primarily for the benefit or interests of the not-for-profit;

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1 (b) the designated public servant takes no part in the entity's business dealings with the
2 City at the entity or at his or her agency. For the purposes of this section, the sponsorship of
3 discretionary funding by elected officials will not constitute participation in an entity's business
4 dealings with the City; and

5 (c) the written designation is disclosed to the Conflicts of Interest Board and will be
6 posted on its website.

7 (2) A public servant designated in accordance with paragraph (1) of this subdivision may
8 take part in such entity's business dealings with the City at the entity and/or at his or her agency
9 if, after written approval, the Board determines that there is a demonstrable nexus between the
10 proposed participation, the public servant's City job, and the mission of the public servant's
11 agency; and that such participation furthers the agency's mission and is not undertaken primarily
12 for the benefit or interests of the not-for-profit entity.

13 (3) The designation made pursuant to paragraph (1) of this subdivision must be by the
14 head of the agency served by the public servant, or by a deputy mayor if the public servant is an
15 agency head. A public servant who is an elected official, including a district attorney, may
16 provide these designations and approvals for themselves, members of their staff, and for the
17 public servants who serve in the agencies they lead.

Chapter 1: Conflicts of Interest

Board Rules § 1-13(e). Conduct Prohibited by City Charter § 2604(b)(2)

Board Rules § 1-08. Conduct Prohibited by City Charter § 2604(b)(2).

- (e)
- (1) A public servant may be designated by their agency head to perform work on behalf of a not-for-profit corporation, association, or other such entity that operates on a not-for-profit basis, including serving as a board member or other position with fiduciary responsibilities, and may utilize City equipment, resources, personnel, supplies, and title, but not City letterhead, as part of that work if:
 - (a) there is a demonstrable nexus between the proposed activity, the public servant's City job, and the mission of the public servant's agency; and that such work furthers the agency's mission and is not undertaken primarily for the benefit or interests of the not-for-profit;
 - (b) the designated public servant takes no part in the entity's business dealings with the City at the entity or at his or her agency. For the purposes of this section, the sponsorship of discretionary funding by elected officials will not constitute participation in an entity's business dealings with the City; and
 - (c) the written designation is disclosed to the Conflicts of Interest Board and will be posted on its website.
 - (2) A public servant designated in accordance with paragraph (1) of this subdivision may take part in such entity's business dealings with the City at the entity and/or at his or her agency if, after written approval, the Board determines that there is a demonstrable nexus between the proposed participation, the public servant's City job, and the mission of the public servant's agency; and that such participation furthers the agency's mission and is not undertaken primarily for the benefit or interests of the not-for-profit entity.
 - (3) The designation made pursuant to paragraph (1) of this subdivision must be by the head of the agency served by the public servant, or by a deputy mayor if the public servant is an agency head. A public servant who is an elected official, including a district attorney, may provide these designations and approvals for themselves, members of their staff, and for the public servants who serve in the agencies they lead.