

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.¹ 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

¹ 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.

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

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

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

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

18 Pursuant to Charter § 2603(h)(2), if the Board sustains its initial determination of
19 probable cause concerning any of the violations alleged in the Notice, the Board will proceed to
20 a hearing or, if the respondent is entitled to disciplinary rights, refer the matter to the
21 respondent’s City agency. Proposed Board Rules § 2-02(c) would explain the process by which
22 the Board refers the respondent’s alleged violations to his or her City agency and clarify that,
23 even if a matter has been referred to the respondent’s City agency, the Board may still proceed to

1 a hearing, as contemplated by Charter § 2603(h)(6), if the agency declines to take disciplinary
2 action or if the Board is unable to resolve the matter together with the agency.

3 Rather than proceeding to a hearing, the respondent may choose to resolve the Board's
4 enforcement action through settlement. While existing Board Rules § 2-05(h) provides for
5 "disposition by agreement," the current provision offers limited guidance to respondents about
6 the contents of such agreements or the settlement process generally. Proposed Board Rules § 2-
7 02(f) would address the entire settlement process by memorializing the requirements and
8 procedures developed by the Board for the negotiation and approval of settlements. A settlement
9 agreement with the Board may take the form of either a Public Disposition or a Public Warning
10 Letter. While the majority of enforcement actions are settled with a Public Disposition, the Board
11 may offer to settle a matter with a Public Warning Letter under limited circumstances, such as
12 when mitigating factors are present. For each form of settlement agreement, the Board requires
13 that the agreement contain certain information. See Proposed Board Rules § 2-02(f)(1). Just as
14 Charter § 2603(h)(4) requires all Board orders be made public as the final disposition in an
15 enforcement action, the Board likewise requires all settlement agreements be made public to
16 educate other City employees about the Board's interpretation of the applicable law. See
17 Proposed Board Rules § 2-02(f)(4)(i).

18 A proposed settlement agreement is not final until all monetary penalties due to the Board
19 have been paid and the agreement is signed by the Board. Because many settlement agreements
20 include the payment of a monetary penalty to the Board, proposed Board Rules § 2-02(f)(3)
21 would codify the Board's practice with regard to the timing and handling of such payments, and
22 proposed Board Rules § 2-02(f)(4) would clarify that a proposed settlement agreement will not
23 be presented to the Board for final approval until all monetary penalties due to the Board have

1 been paid. When the Board reviews a proposed settlement, there is a possibility that the Board
2 may request a different penalty or ask to modify language in the agreement. Thus, proposed
3 Board Rules § 2-02(f)(4) would inform respondents that a proposed settlement agreement is not
4 final until it is approved and signed by the Board.

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

10 Proposed § 2-03 Formal Proceedings

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

18 Pursuant to Charter § 2603(h)(2), the Board “shall hold or direct a hearing to be held” to
19 determine whether the respondent has violated the applicable law. When the existing rules were
20 drafted, the Board envisioned that hearings might be conducted by the Board, a member of the
21 Board, or OATH. However, neither the Board nor any Board member has ever held a hearing.
22 Instead, all such hearings are conducted by the OATH Trial Division. OATH provides an
23 impartial forum and is staffed by professional ALJs who regularly handle adjudicatory

1 proceedings for many City agencies. Proposed Board Rules § 2-03(a) would codify the Board's
2 current practice that hearings are held at OATH in accordance with OATH's Rules of Practice,
3 which are set forth in Title 48 of the Rules of the City of New York ("OATH Rules"). Once the
4 Board commences formal proceedings, the OATH Rules govern the hearing process.

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

21 After a hearing is conducted at OATH, the ALJ issues a report of recommended findings
22 of fact and conclusions of law and recommended disposition for the enforcement action, which
23 may include imposing a penalty or dismissing some or all of the Board's charges. See Proposed

1 Board Rules 2-03(g). Under existing Board Rules § 2-04(a), the respondent and the enforcement
2 attorney have ten days from the date of service of the report to submit a comment to the Board.
3 In practice, the respondent often needs more than ten days and the enforcement attorney may
4 wait to see what, if anything, the respondent submits before making a submission. Proposed
5 Board Rules § 2-03(h) would revise the prescribed time to submit a comment to the Board and
6 establish a more fair process by giving the parties a longer amount of time to submit a comment
7 to the Board and giving each party an opportunity to respond to the comment submitted by the
8 opposing party.

9 Proposed Board Rules § 2-03(i) would memorialize the Board's burden of proof and
10 identify the specific materials reviewed by the Board in making its final determination about
11 whether the respondent violated the applicable law. If the Board determines that the respondent
12 has committed a violation, the Board will issue an order to the respondent pursuant to Charter
13 § 2603(h)(3). Proposed Board Rules § 2-03(j)(1) would provide a more concise and plain
14 language description of the content of such orders, and make clear that all Board orders are made
15 public. Furthermore, proposed Board Rules §§ 2-03(g) and 2-03(j)(2) would make clear that,
16 while the OATH report is confidential at the time it is issued, the report may become public as
17 part of the Board's final order. Finally, proposed Board Rules § 2-03(j)(3)-(4) would codify the
18 method of service for Board orders and the Board's practice of setting a thirty-day deadline from
19 the date of service for the payment of a monetary penalty imposed in a Board order.
20 Alternatively, if the Board determines, after a hearing, that there is not sufficient evidence to
21 determine that the respondent violated the applicable law, proposed Board Rules § 2-03(k) would
22 explain that the respondent is sent the Board's final decision in writing and that all materials
23 remain confidential.

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

7 **Text of Proposed Board Rules**

8 New material is underlined.

9 [Deleted material is in brackets.]

10

11 **Chapter 2: Procedural Rules for Enforcement Actions**

12 **§ 2-01 Applicability and Definitions.**

13 (a) Applicability.

14 This chapter establishes the procedural rules for enforcement actions brought pursuant to Charter
15 § 2603(h) to address alleged violations of: Chapter 68 of the New York City Charter, the
16 Conflicts of Interest Law; § 3-224 through § 3-228 of the New York City Administrative Code,
17 the Lobbyist Gift Law; § 3-901 through § 3-907 of the New York City Administrative Code, the
18 Affiliated Not-for-Profits Law; and § 3-1101 through § 3-1107 of the New York City
19 Administrative Code, the Legal Defense Trusts Law.

20

21 (b) Definitions.

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

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

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

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

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

18
19 **§ 2-02 Informal Proceedings.**

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

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

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

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

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

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

(i) If the respondent submits a substantive written response to the Notice, the Board will review the response to determine whether there remains probable cause to believe that any alleged violation occurred and will either dismiss the enforcement action or sustain its initial determination of probable cause in whole or in part.

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

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(c) Referral to agency.

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

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

(2) If the agency is pursuing disciplinary action against the respondent, the Board may resolve the enforcement action together with the agency. If the Board is unable to resolve the enforcement action together with the agency, the Board may commence formal proceedings against the respondent upon conclusion of the agency’s disciplinary action.

(d) Representation by an attorney or other person.

(1) If the respondent elects to be represented by an attorney or any other person, the representative appearing for the respondent must submit a written notice of appearance to the Board. The appearance of a member in good standing of the bar of a court of general jurisdiction of any state or territory of the United States will be indicated by the designation “Attorney for (person represented).” The appearance of any other person will be indicated by the designation “Representative for (person represented).” The Board will not accept a response from or discuss the details of an enforcement action with any attorney or other person who has not submitted a notice of appearance.

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

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

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12 (e) Stay of an enforcement action.

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

17
18 (f) Settlement.

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

22 (i) A Public Disposition must include an admission of the relevant facts; an
23 acknowledgment that the admitted conduct violated a specific provision of

1 the Conflicts of Interest Law, the Lobbyist Gift Law, the Affiliated Not-
2 for-Profits Law, or the Legal Defense Trusts Law; and an appropriate
3 penalty to address the admitted conduct.

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

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

14 (3) If the enforcement attorney and the respondent reach a proposed settlement
15 agreement, it will be reduced to writing and signed by the respondent, the
16 respondent's representative, if applicable, and a representative of the respondent's
17 employing City agency, if applicable. Any monetary penalty to be paid to the Board
18 is due upon signing unless otherwise specified in the proposed settlement agreement.
19 Monetary penalty payments will be held by the Board in escrow until the proposed
20 settlement agreement is fully executed by the Board.

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

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

5
6 (c) Ex Parte communications with the Board.

7 (1) After service of the Notice of Petition and Petition pursuant to Board Rules § 2-
8 03(b)(1), any Board attorney involved in the prosecution of the enforcement action
9 may not communicate *ex parte* with any member of the Board or any attorney serving
10 as counsel to the Board concerning the merits of the enforcement action, except as
11 provided in paragraph (2) of this subdivision.

12 (2) An enforcement attorney may communicate *ex parte* with members of the Board or
13 an attorney serving as counsel to the Board with respect to ministerial matters
14 involving the enforcement action; on consent of the respondent or respondent's
15 representative; or at the request of the Board or an attorney serving as counsel to the
16 Board if necessary.

17
18 (d) Answer.

19 The respondent may serve and file a written answer to the Petition in accordance with the OATH
20 Rules. The answer may contain specific responses, by admission, denial, or otherwise, to each
21 allegation of the Petition and assert all affirmative defenses, if any. The respondent may include
22 in the answer matters in mitigation. The answer must contain the full name, address, telephone
23 number, and email address of the respondent. If the respondent is represented, the

1 representative's name, address, telephone number and email address must also appear on the
2 answer. The answer must be signed by the respondent or respondent's representative.

3

4 (e) Settlement.

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

7

8 (f) Hearing.

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

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

14 (3) The enforcement attorney will initiate the presentation of evidence. After the
15 enforcement attorney has completed the presentation of the Board's evidence, the
16 respondent may present evidence. The enforcement attorney may present rebuttal
17 evidence.

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

20

21 (g) OATH report.

22 After a hearing has been conducted, OATH will issue a confidential report of its recommended
23 findings of fact and conclusions of law and its recommended disposition of the enforcement

1 action. OATH will send the report, along with the original transcript of the hearing and all
2 documents introduced into the record, to the Board for review. OATH will send a copy of the
3 report to the enforcement attorney and the respondent or respondent's representative, if
4 applicable.

5
6 (h) *Comment on OATH report.*

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

14
15 (i) *Final review by the Board.*

16 For the purposes of Charter § 2603(h)(3), the Board will review the OATH report, along with the
17 original transcript of the hearing and all documents introduced into the record, and any
18 comments and responses to comments submitted to the Board pursuant to Board Rules § 2-03(h),
19 to determine whether it has been proven by a preponderance of the evidence that the respondent
20 violated a provision of the Conflicts of Interest Law, the Lobbyist Gift Law, the Affiliated Not-
21 for-Profits Law, or the Legal Defense Trusts Law.

22
23 (j) *Board order finding a violation.*

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

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

13 (3) The order will be sent by first class mail to the respondent’s last known residential
14 address or actual place of business and to the respondent’s representative, if
15 applicable.

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

20
21 (k) Board dismissal.

22 If the Board determines that it has not been proven by a preponderance of the evidence that the
23 respondent violated any provision of the Conflicts of Interest Law, the Lobbyist Gift Law, the

1 Affiliated Not-for-Profits Law, or the Legal Defense Trusts Law, the Board will issue a written
2 decision that dismisses the enforcement action and states its final findings of fact and
3 conclusions of law. The decision will be sent to the respondent and respondent’s representative,
4 if applicable, and will not be made public. All underlying records, reports, memoranda, and files
5 will remain confidential.

6
7

8 **[Chapter 2: Procedural Rules for Hearings.**

9 **§2-01 Initial Determination**

10 **§2-02 Commencement of Formal Proceedings and Pleadings**

11 **§2-03 Hearing**

12 **§2-04 Decisions and Orders**

13 **§2-05 General Matters**

14

15 **§2-01 Initial Determination.**

16 (a) *Notice.*

17 If the Board makes an initial determination, based on a complaint, investigation, or other
18 information available to the Board, that there is probable cause to believe that a public servant
19 (which for purposes of Charter §2603(h) includes a former public servant) has violated a
20 provision of Chapter 68 of the City Charter, the Board shall notify the public servant of its
21 determination in writing. The notice shall contain a statement of the facts upon which the Board
22 relied for its determination of probable cause and a statement of the provisions of law allegedly
23 violated. The notice shall afford the public servant an opportunity, either orally or in writing, to

1 respond to, explain, rebut, or provide information concerning the allegations in such notice
2 within fifteen days of service of the notice. The notice shall also inform the public servant of his
3 or her right to be represented by counsel or any other person, and shall include a copy of the
4 Board's procedural rules. A notice of initial determination shall not be required in a proceeding
5 brought pursuant to Section 12-110 of the Administrative Code.

6

7 *(b) Request for a stay.*

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

11

12 *(c) Admission of facts.*

13 If, in response to the Board's notice, the public servant admits to the facts contained therein or to
14 a violation of the provisions of Chapter 68 of the City Charter and elects to forgo a hearing, the
15 Board may, after consulting with the head of the agency served or formerly served by the public
16 servant, or, in the case of an agency head, after consulting with the Mayor, issue an order finding
17 a violation and imposing the penalties it deems appropriate under Chapter 68 of the City Charter,
18 provided, however, that pursuant to Charter §2603(h)(3), the Board shall not impose penalties
19 against members of the City Council, or public servants employed by the City Council or by
20 members of the City Council, but may recommend to the City Council such penalties as the
21 Board deems appropriate. When a penalty is recommended, the City Council shall report to the
22 Board what action was taken.

23

1 (d) *No probable cause finding.*

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

5

6 **§2-02 Commencement of Formal Proceedings and Pleadings.**

7 (a) *Determination of probable cause.*

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

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

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

18

19 (b) *Petition.*

20 The Board shall institute formal proceedings by serving a petition on the public servant. The
21 petition shall set forth the facts which, if proved, would constitute a violation of Chapter 68 of
22 the City Charter or Section 12-110 of the Administrative Code, as well as the applicable
23 provisions thereof which are alleged to have been violated. The petition shall also advise the

1 public servant of the public servant's rights to file an answer, to a hearing, to be represented at
2 such hearing by counsel or any other person, and to cross-examine witnesses and present
3 evidence.

4

5 (c) *Answer.*

6 (1) *General rule.*

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

11

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

13 The answer shall be in writing and shall contain specific responses, by admission, denial,
14 or otherwise, to each allegation of the petition and shall assert all affirmative defenses, if
15 any. The public servant may include in the answer matters in mitigation. The answer shall
16 be signed and shall contain the full name, address, and telephone number of the public
17 servant. If the public servant is represented, the representative's name, address, and
18 telephone number shall also appear on the answer, which shall be signed by either the
19 public servant or by his or her representative.

20

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

22 If the public servant fails to serve an answer, all allegations of the petition shall be
23 deemed admitted and the Board shall proceed to hold a hearing in which prosecuting

1 counsel shall submit for the record an offer of proof establishing the factual basis on
2 which the Board may issue an order. If the public servant fails to respond specifically to
3 any allegation or charge in the petition, such allegation or charge shall be deemed
4 admitted.

5

6 (d) *Amendment of pleadings.*

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

12

13 **§2-03 Hearing.**

14 (a) *Conduct of hearings generally.*

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

19

20 (b) *Subpoenas.*

21 Subpoenas requiring the attendance of a witness and subpoenas *duces tecum* requiring the
22 production of books, papers, and other things may be issued only by (i) the Administrative Law
23 Judge, where the hearing has been referred to OATH, or (ii) a member of the Board, where the

1 hearing is conducted by the Board or by a member of the Board, upon application of a party or
2 upon the Administrative Law Judge's or the Board member's own motion. In addition to or in
3 lieu of these subpoenas, the Administrative Law Judge or the Board member may also issue an
4 order directing the party or person under the control of a party to attend or produce.

5

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

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

11

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

13 *(1) Generally.*

14 The Board may hear a case or may designate a member of the Board to hear a case, make
15 findings of fact and conclusions of law, preside over pre-hearing matters and
16 adjournments, and make recommendations to the Board for the proposed disposition of
17 the proceeding. When a hearing is conducted by the Board, the hearing shall be presided
18 over by the Board's Chair or by his or her designee. The Board or Board member shall
19 conduct the hearing, including such pre-hearing matters as conferences, discovery, and
20 motion practice, in conformance with the rules and procedures of OATH, as set forth in
21 Title 48 of the Rules of the City of New York, except as otherwise provided by these
22 rules.

23

1 (2) *Disposition conferences and agreements.*

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

8

9 (3) *Order of proceedings.*

10 Prosecuting counsel shall have the burden of proof by the preponderance of the evidence,
11 shall initiate the presentation of evidence, and may present rebuttal evidence. The public
12 servant may introduce evidence after prosecuting counsel has completed his or her case.
13 Opening statements, if any, shall be made first by prosecuting counsel. Closing
14 statements, if any, shall be made first by the public servant. This order of proceedings
15 may be modified at the discretion of the Board or Board member.

16

17 **§2-04 Decisions and Orders.**

18 (a) *Report to the Board.*

19 When a hearing has been conducted by either OATH or a member of the Board designated to
20 hear the case, a report of recommended findings of fact and conclusions of law and
21 recommendations for the disposition of the proceeding shall be issued and forwarded, along with
22 the original transcript of the proceeding and all documents introduced into the record, to the
23 Board for review and final action. The report shall not be made public. A copy of the report and

1 recommendation shall be sent to all parties and their counsel or other representative in order to
2 afford them the opportunity to comment before final action is taken by the Board. If prosecuting
3 counsel or the public servant wishes to comment, he or she shall do so within ten days of service
4 of the report and recommendation.

5

6 (b) *Finding of violation.*

7 If after the hearing and upon a consideration of all the evidence in the record of hearing,
8 including comments, the Board finds that a public servant has engaged in conduct prohibited by
9 Chapter 68 of the City Charter, the Board shall consult with the head of the agency served or
10 formerly served by the public servant, or in the case of an agency head, consult with the Mayor.
11 Where the Board finds a violation of Chapter 68 or section 12-110 of the Administrative Code,
12 the Board shall state its final findings of fact and conclusions of law and issue an order imposing
13 any penalties it deems appropriate under either statute. The order shall include notice of the
14 public servant's right to appeal to the New York State Supreme Court. Alternatively, in the case
15 of a violation of Chapter 68, the Board may state its findings and conclusions and recommend a
16 penalty, if any, to the head of the agency served by the public servant or former public servant
17 or, in the case of an agency head or former agency head, to the Mayor. Pursuant to Charter
18 §2603(h)(3), the Board shall not impose penalties against members of the City Council, or public
19 servants employed by the City Council or by members of the City Council, but may state its
20 findings and conclusions and recommend to the City Council such penalties as the Board deems
21 appropriate. When a penalty is recommended, the head of the agency, Mayor, or City Council
22 shall report to the Board what action was taken.

23

1 (c) *Consultation by agency.*

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

4

5 (d) *Dismissals.*

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

10

11 **§2-05 General Matters.**

12 (a) *Appearances before the Board.*

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

19 (2) The appearance of a member in good standing of the bar of a court of general
20 jurisdiction of any state or territory of the United States shall be indicated by the suffix
21 "Esq." and the designation "Attorney for (person represented)." The appearance of any
22 other person shall be indicated by the designation "Representative for (person
23 represented)."

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

3 (4) A person may not file a notice of appearance on behalf of a party unless the person
4 has been retained by that party to represent the party before the Board. Filing a notice of
5 appearance constitutes a representation that the person appearing has been so retained.
6

7 (b) *Withdrawal and substitution of counsel.*

8 (1) An attorney who has filed a notice of appearance shall not withdraw from
9 representation without the permission of the Board, upon application. Withdrawals shall
10 not be granted unless upon consent of the client or when other cause exists, as delineated
11 in the applicable provisions of the Code of Professional Responsibility.¹

12 (2) Notices of substitution of counsel served and filed more than twenty days prior to a
13 hearing before the Board or before a member of the Board may be filed without leave of
14 the Board or Board member. Notices of substitution of counsel served and filed less than
15 twenty-one days prior to a hearing before the Board or before a member of the Board
16 may be filed only with the permission of the Board or Board member, which permission
17 shall be freely given, absent prejudice or substantial delay of the proceedings.
18

19 (c) *Service of petition by Board.*

20 A petition shall be served on the public servant

21 (i) in the manner provided in Section 312-a, or subdivisions 1, 2, or 4 of Section
22 308, of the New York Civil Practice Law and Rules for service of a summons or

¹ Now the Rules of Professional Conduct

- 1 (ii) by both certified mail, return receipt requested, and first class mail to the
2 public servant's last known residence or actual place of business or
3 (iii) in such manner as the Board directs, if service is impracticable under
4 paragraphs (i) and (ii) of this subdivision, or
5 (iv) in any manner agreed upon by counsel to the Board and the public servant or
6 his or her representative.

7
8 (d) *Service of other documents by Board.*

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

- 11 (1) by personal delivery to the public servant or
12 (2) by first class mail to the public servant's last known residence or actual place of
13 business or
14 (3) by overnight delivery service to the public servant's last known residence or actual
15 place of business or
16 (4) by telephonic facsimile (FAX) or similar transmission or
17 (5) by leaving the paper at the public servant's last known residence with a person of
18 suitable age and discretion or
19 (6) in such manner as the Board directs, if service is impracticable under paragraphs (1),
20 (2), (3), (4), or (5) of this subdivision, or
21 (7) in any manner agreed upon by counsel to the Board and the public servant or his or
22 her representative. Where the public servant has appeared by a representative, all
23 papers served by the Board subsequent to that appearance shall be served upon the

1 representative by one of the methods provided in paragraphs (1)-(7) of this
2 subdivision.

3
4 (e) *Computation of time.*

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

11
12 (f) *Confidentiality.*

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

19
20 (g) *Ex Parte communications with Board.*

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

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

5
6 (h) *Disposition by agreement.*

7 At any time after the service of a notice of probable cause in a proceeding brought pursuant to
8 Chapter 68 or at any time after service of a petition in a proceeding brought pursuant to Section
9 12-110 of the Administrative Code, the public servant and the Board may agree to dispose of the
10 case by agreement. For this purpose, the Board or any Board member designated by the Board
11 may conduct a disposition conference, provided that, when the Board or a member of the Board
12 conducts or is to conduct the hearing, the Board shall comply with the requirements of section 2-
13 03(d)(2). All offers of disposition, whether made at a conference, hearing, or otherwise, shall be
14 confidential and shall be inadmissible at trial of any case. If a disposition by agreement is
15 reached, it shall be reduced to writing and signed by the public servant or his or her
16 representative and the Board or, in the discretion of the Board, placed on the record. When a
17 disposition by agreement contains an acknowledgment that a public servant's conduct has
18 violated a provision of Chapter 68 of the City Charter or Section 12-110 of the Administrative
19 Code, that disposition by agreement shall be made public by the Board.

20
21 (i) *OATH rules.*

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