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REPORT OF THE NEW YORK CITY CHARTER REVISION COMMISSION

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CHAPTER 68 CONFLICTS OF INTEREST

Section 2600. Preamble. This chapter of the charter is intended to accomplish the goals set forth in the preamble by creating an independent agency with power to administer a clearer and stronger conflicts of interest code. The code's prohibitions, however, do not define the full scope of ethical behavior for public servants but, rather, identify a definable and crucial subset of ethical behavior, that is, those actions which conflict with a public servant's official duties. In this respect, the chapter sets forth minimum standards, the violation of which may merit the imposition of serious civil and, under some circumstances, criminal penalties. Recognizing that these standards do not define the full range of ethical behavior, the

Authority and the Triborough Bridge and Tunnel Authority, which are, by virtue of that definition, subject to state conflict of interest laws. The term "agency" includes entities, such as community colleges, which are not specifically listed but which fall within the general definition provided.

3. "Agency served by a public servant." While this phrase normally will refer to the agency employing the public servant, the board may wish to promulgate rules defining how the term "agency served" will apply in instances where employees of an agency are cross-designated to act on behalf, or in furtherance, of the powers and responsibilities of another agency.

4. "Appear." Encompassed within this term are personal appearances, as well as communications made in writing, by telephone, or in any other form, which are made for compensation. The definition excludes communications involving ministerial matters and non-compensated communications.

6. "Blind trust." The essential characteristics of a qualifying blind trust are set forth in the definition. The board is required to define, by rule, requirements regarding the authority of trustees, the confidential treatment of trust information, and such other requirements as it deems necessary.

8. "Business dealings with the city." This definition is at the core of many of the chapter's prohibitions. It is intended to capture the various transactions over which agency officials exercise discretion through contracts, agreements, or

through the granting of rights, privileges or advantages to individuals or firms, excepting those which involve a public servant's residence.

11. "Firm." All forms of enterprise are included within the definition. An individual acting as a consultant or in any other individual capacity would be considered a sole proprietor. Public benefit corporations, local development corporations, or other similar entities as defined by rule of the board are excluded from the definition.

12. "Interest." This term refers to both "ownership interest" and "position", both of which are defined terms (see section 2601(16) and 2601(18)).

15. "Ministerial matter." Exceptions are granted in several instances in the chapter (e.g., "business dealings with the city") for ministerial matters. These are official actions which do not involve substantial personal discretion and are carried out in a prescribed manner. The definition is not intended to be construed broadly.

16. "Ownership interest." An interest in a firm is an "ownership interest" for the purposes of this chapter if it represents over five percent of the firm, or $25,000, whichever is less, or five percent or $25,000 of the firm's indebtedness, whichever is less. For example, under this definition, a six percent interest in a firm, with a value of $18,000, would constitute an ownership interest. Interests held by a public servant's spouse or unemancipated child are included within the

definition.

The value of the ownership interest is determined by the amount of the initial investment made in the firm, not by appreciated worth, in order to permit public servants to determine with certainty whether their holdings constitute ownership interests.

Regardless of their value, all interests held in firms in which the public servant, the public servant's spouse, or unemancipated child exercise managerial control or responsibility constitute ownership interests.

The board is required to adjust the $25,000 figure by rule once every four years to reflect change in the consumer price index.

17. "Particular matter." The term particular matter, used in the post-employment prohibitions contained in 2604(d), defines those matters engaged in by public servants during their public employment in relation to which they may not make appearances before city agencies, or accept employment or remuneration for services, after leaving city service. The definition excludes work performed in relation to general subject matters or policy issues where the results apply to categories of individuals rather than a specific party or parties. Moreover, the prohibition which is found in section 2604(d) applies only when the same specific party or parties continue to be involved in the particular matter. Given the permanent nature of the post-employment prohibition, the definition of "particular

matter" is intended to be construed narrowly.

18. "Position." Together with "ownership interest," the category of relationships identified in the term "position" constitute interests which are prohibited while an individual is a public servant if the requisite business dealing with the city exists. "Positions" include an array of relationships from employees to consultants.

19. "Public servant." For the purpose of identifying those individuals who are subject to the conflict of interest standards, the term "public servant" has been defined to include all officials, officers and employees of the city, whether or not they are salaried or receive compensation in the form of per diem payments, reimbursement for costs, or otherwise. The term includes all elected officials, and all other officers and employees of the city whether appointed or otherwise employed. The only individuals excluded from the application of the conflict of interest standards are unpaid members of advisory committees whether or not they receive reimbursement for costs. See definition of advisory committee in 2601[1], above.

20. "Regular employee." Included within the category of public servant, defined above in 2601(19), is a subcategory of employees who are "regular employees." The term includes those public servants whose "primary employment", as shall be defined by rule of the board, is with the city.

The commission's intention in creating this subcategory is to permit a more limited application of certain prohibitions

of this chapter to city officers and employees who are part-time employees, or part-time members of boards or commissions, or whose employment with the city is not a primary employment. Specifically, it is the intent of the commission to encourage participation in city government by persons who may be unlikely to accept appointment if prohibited from having interests in, and contacts with, city agencies other than the one by which they are employed. Community board members whose primary employment is not with the city are also excluded from the category of regular employee. (Any person otherwise employed by the city who is appointed to a community board does not, however, avoid characterization as a regular employee by virtue of the community board appointment.)

22. "Supervisory official." A supervisory official of a public servant includes all persons having authority to control and direct the work of a public servant. This typically would include all individuals in a direct supervisory line above the public servant on an organization chart. The term is not limited to the public servant's immediate supervisor.

Section 2602. Conflicts of interest board. This section provides for the creation of a renamed and restructured board. As previously discussed, the change of name from Board of Ethics to Conflicts of Interest Board reflects the commission's view that the prohibitions set forth in this chapter do not encompass the full range of ethical standards. The restructuring of the board

and the change in the manner of its appointment reflect the commission's judgment that the independence of the board should be protected and enhanced and that it should be appointed in an open, public fashion.

The board is to have three members, appointed by the mayor with the advice and consent of the Council. The mayor shall designate the chair. The choice of this model was the subject of extensive discussion. A number of commentators believed that the board members should be appointed by a variety of elected city officials to emphasize the perception of independence from the mayor. The commission, however, determined that appointment by the mayor was consistent with mayoral responsibility for the administration and execution of law, and that confirmation by the Council would ensure that appointments are made openly and on the basis of merit.

All of the members are to have qualifications commensurate with the important functions performed by the board as the administrator and enforcer of the conflict of interest standards. Specifically, none of the members may hold any public office or employment or party office or appear as a lobbyist before the city. This set of requirements reflects a substantial change from the Board of Ethics, which includes the corporation counsel and the director of personnel. The decision to remove these officers from the board reflects the commission's judgment that the board should be, and appear to be, as independent as possible.

The decision to compensate members of the board on a per diem basis was made in recognition of the increased responsibility and anticipated increased work load of the board, as well as the desire of the commission to expand the pool of persons from whom members may be chosen.

Section 2603. Powers and obligations. The powers of the Conflicts of Interest Board are expanded significantly beyond those of the Board of Ethics. While retaining the power to issue advisory opinions and to request investigations by the Department of Investigation, the board has the added responsibilities of rulemaking, training and education, enforcement, and review of financial disclosure forms. Each of the powers shall be exercised by the board over all public servants, except that the board may not impose penalties against a member of the Council or any member of the Council staff, but may only recommend penalties for imposition by the Council.

Subdivision a. Obligation to promulgate rules. The board is required to promulgate such rules as it deems necessary to implement and interpret the provisions of the chapter. These may include rules of procedure necessary to assist members of the public and public servants to participate in the board's processes, and rules applying and interpreting the provisions of the chapter, particularly the conflict of interest standards. Such an express obligation, of course, is not required for the board to promulgate rules pursuant to its general authority under

this section. The commission's intent is to encourage rulemaking by the board as a means of further clarifying the provisions of the chapter. As the conflict of interest standards are applied to various factual situations, the board may identify areas which are frequently the subject of advisory opinions and adjudications and are considered susceptible to being addressed by rule of the board.

In some cases, the provisions of the chapter cannot become effective without implementing rules. In other cases, the board is given discretion whether to add to or further define a particular requirement but must do such by rule. Provisions which require rules to become effective include: requirements of a "blind trust" (section 2601(6)); modification of ownership interest amount (sections 2601(16) and 2603(a)); public servants whose primary employment is with the city (section 2601(2)); adoption of content of advisory opinions of board of ethics (section 2603(c)(4)); procedural rules for filing of financial disclosure statements (section 2603(d)(3)); definition of valuable gift (section 2604(b)(5)); and definition of persons charged with substantial policy discretion (section 2604(b)(12)). Provisions which explicitly give the board discretion to add to or clarify a charter provision include definition of "other similar entity", within the charter definition of "firm" (section 2601(11)); and identification of conduct prohibited by 2604(b)(2).

The January 1, 1990 effective date of the conflict of

interest standards is designed in part to allow the board sufficient time to promulgate such rules. All rules of the board must be promulgated according to the standard procedures for rulemaking contained in the new city administrative procedure act (Chapter 45 of the charter).

Subdivision b. Training and education. The commission believed that the training and education of public servants regarding the conflict of interest standards and procedures is an essential element in the administration of the chapter. Accordingly, the board is required to provide training to all new public servants regarding the provisions of this chapter and to assist agencies in conducting ongoing training and education programs.

Subdivision c. Advisory opinions. The board retains the power to issue advisory opinions. Paragraph one of subdivision c provides that advisory opinions may be issued upon request of a public servant or a supervisory official of a public servant. Paragraph five of subdivision c specifies that the term "public servant" includes, for this purpose, prospective public servants and former public servants and that the term "supervisory official" includes a supervisory official who shall supervise a prospective public servant and a supervisory official who supervised a former public servant. The effect of this provision is to allow a person about to enter city service to obtain an opinion regarding the potential application of the conflict of interest standards and to permit a former public

servant to obtain opinions about future activities.

Paragraph two encompasses changes in the former practice of issuing advisory opinions to limit such opinions to proposed future conduct. Advisory opinions are to be used to provide advice and guidance to public servants who are uncertain of the application of the conflict of interest standards to specific contemplated actions. They may not be used to condone past or ongoing conduct.

Issues regarding such ongoing or past conduct are to be considered by the board under the procedures provided in subdivision e of this section (complaints), or in subdivision g (referral of matters within the board's jurisdiction). Subdivision g allows public servants to seek a decision from the board on whether their past or ongoing actions conform to the conflict of interest standards, thus providing public servants with an opportunity to obtain a "name-clearing" should they so desire. Review under subdivision g is similar to the review conducted by the board upon receipt of a complaint and may thus result in the conduct of a hearing and the imposition of penalties.

In rendering an advisory opinion, the board may rely on the request alone, or may make further inquiries to confirm or supplement the information provided. The requesting party may offer or, in response to a request by the board, submit additional information as may be necessary for the board to issue an advisory opinion. All such submissions must be in writing and

signed.

No advisory opinions may be issued other than on request of a public servant or a supervisory official. This is a change from the pre-existing charter which allowed the Board of Ethics to issue advisory opinions on its own initiative. The change was made in recognition of the fact that under the revised charter, advisory opinions have a binding effect on future conduct and considerable penalties may be imposed for conduct which, under the terms of an opinion, is deemed to violate the conflict of interest standards.

Paragraph two provides that advisory opinions are binding on the city with respect to the public servants whose actions are reviewed. Stated differently, a public servant cannot be penalized for any action taken in accordance with an advisory opinion. If the board determines that its opinion was in error or incomplete, it may, on notice to the public servant, amend the opinion. The amended opinion may not, however, force a public servant to reverse an action taken under the prior advisory opinion, although ongoing conduct may be required to be modified, and may not lead to the imposition of penalties for actions taken under such prior advisory opinion.

Advisory opinions apply only to the individual in question and to the set of facts considered. While advisory opinions may be instructive and of some guidance to other public servants, they may not be relied upon by such other public servants as permission to engage in any particular conduct and

cannot constitute a defense to any action taken. However, advisory opinions may be cited by public servants in enforcement proceedings in support of actions taken and may be considered by the board in reaching decisions to the extent they are relevant. Additionally, if the board determines that an opinion reflects a general principle which may be applied more broadly to other public servants, it should embody the content of the opinion in a rule.

Paragraph four recognizes that certain of the advisory opinions issued by the Board of Ethics since its creation in 1959 may have continuing value under the new conflict of interest standards. Accordingly, the board is required to review all existing opinions of the Board of Ethics and to determine which should be readopted in the form of a rule as valid interpretations of the provisions of this revised chapter on conflicts of interest. The board is required to initiate this rulemaking (i.e., publish a notice of proposed rulemaking) by September 1, 1989. It thus has approximately five months from its establishment, until September 1, 1989, to engage in the required review.

Subdivision d. Financial disclosure statements. All financial disclosure forms which are required by state or local law to be completed by public servants are required by subdivision d to be filed with the Conflicts of Interest Board. This includes those currently required to be filed with the city clerk (Ad. Code section 12-110). This provision exercises the

option, under section 812(3) of the NYS Public Officers Law, to have filings made with a city board of ethics rather than the Temporary State Commission on Local Government Ethics.

In order to comply with the requirements of the state act, paragraph two of subdivision d provides that each form filed with the board shall be examined to determine whether there is compliance with financial disclosure laws and the provisions of the chapter.

Other forms of financial disclosure which are required by an office or administration (e.g., the disclosure to the Department of Investigation currently required by mayoral executive order) are not required to be filed with the Conflicts of Interest Board.

Subdivision e. Complaints of alleged violations. The Conflicts of Interest Board is required by subdivision e to receive complaints regarding alleged violations of the provisions of the chapter. No limit is placed on who may make a complaint, and there is no requirement that a complaint be received in writing or that the complainant be identified. The commission thereby intends that the board accept oral or anonymous complaints. Paragraph two of subdivision e provides, however, that the board is only required to act upon complaints received in writing. The board is not obligated to act on complaints received orally, but may do so.

When a written complaint is received by the board, it is required (or in the case of an oral complaint, permitted) to

take one of the following four actions.

1. Dismiss the complaint.

2. Request an investigation.

3. Make an initial determination of probable cause.

4. Refer the matter to the agency, if the board deems the violation to be minor or if related disciplinary charges are pending against the public servant.

For the purpose of completing the analysis of complaints received which must be included in its annual report, the board should maintain a record of all complaints received and actions taken.

Subdivision f. Investigations. Subdivision f provides that the Department of Investigation is to act on behalf of the Conflicts of Interest Board with regard to investigations. The commission considered but rejected the option of giving the board power to conduct its own investigations. This decision reflects the commission's view that a separation should be maintained between investigative and adjudicative functions.

Subdivision g. Referrals to the board. See discussion of subdivision e above.

Subdivision h. Hearings. This subdivision gives the board power to adjudicate disputes. Presently, violations of the code of ethics are enforced, if at all, as part of disciplinary actions at the agency level or by criminal prosecution. In the commissions's view, the lack of enforcement power in the Board of Ethics was a significant flaw in the law.

While the commission seeks to assure compliance with the provisions of the chapter through the preventive measure of an aggressive training and education program, compliance will also be enhanced by the knowledge that violations can be enforced administratively through adjudications which may result in the imposition of civil penalties of up to $10,000 and suspension or removal from office.

The hearing process is initiated upon an initial determination by the board that there is probable cause to believe a violation of the provisions of the chapter has occurred. Paragraph one of subdivision h provides that such determinations may be made pursuant to a complaint or investigation (including referrals made under subdivision g), or based on any other information received by the board. The board is thus not limited to taking action in response to complaints received, but may also initiate adjudications on its own.

Prior to making any final determination that there is probable cause to believe a violation may have occurred, the board is required by paragraph one to provide the public servant with a statement of the facts upon which it relied in making its initial determination and to afford the public servant an opportunity to respond either orally or in writing. This procedure affords the public servant the fullest opportunity, prior to the initiation of an adjudication, to respond to, explain, rebut, or provide information concerning, the allegations upon which any charge by the board may be based.

Upon receipt of the public servant's response to such notice, the board may dismiss the matter or issue a determination that there remains probable cause to believe a violation occurred. If the board determines that there remains probable cause, the board shall either hold a hearing or direct a hearing to be held to decide if a violation has occurred. However, if the public servant is subject to the jurisdiction of a state law provision or collective bargaining agreement which provides for the conduct of a disciplinary hearing by another body, the board shall refer the matter to the appropriate entity.

In instances where the board does not adjudicate the dispute and referral is made instead to another agency, paragraph two of the subdivision requires that the board be consulted by the agency prior to the issuance of its final decision. This mechanism provides the board with an opportunity to review the agency's interpretations of the conflict of interest provisions and to provide guidance thereon.

When an adjudication is conducted by the board, such hearings must be on-the-record and in accordance with the city administrative procedure act (CAPA) provisions on adjudications, (section 1045). Hearings shall be heard by the Office of Administrative Trials and Hearings (section 1048), unless the board determines by rule that it should conduct its own adjudications.

If the board determines that a violation has occurred, paragraph three requires that it consult with the head of the

agency involved, (or if the public servant is an agency head, with the mayor), prior to imposing any penalties. This provision recognizes that agencies have a strong interest in the disciplining of their officers and employees. While the board is not required to adopt the views expressed by the agency, an agency head may raise issues or concerns the board will wish to consider in rendering a decision concerning the imposition of penalties. Penalties that may be imposed are discussed below in section 2606.

The commission considered in depth the question of whether the Conflicts of Interest Board should have jurisdiction over members of the Council and their employees. While the commission decided that there should be one board having jurisdiction over all public servants, a concern that the Council retain the ultimate power to judge the qualifications of its own members and staff resulted in a decision to prohibit the board from imposing penalties on members of the Council or staff following a determination of guilt in an adjudication. The board may, but is not required to, send the Council a recommendation regarding appropriate penalties. The Council is free to act as it deems appropriate.

Whenever the board recommends a penalty, the agency head to whom the recommendation is sent (including the Council) is obligated, by paragraph three, to report back to the board regarding its disposition of the matter. This reporting requirement is intended to keep the board fully informed

regarding matters involving application of the conflict of interest standards.

Paragraph four provides that hearings of the board shall not be public unless requested by the public servant. When the board determines that a public servant has violated a provision of the chapter and has issued an order, stating its findings of fact and conclusions of law pursuant to paragraph three, that order shall be made public by the board.

Paragraph six makes clear that the board's exercise of its adjudicatory powers does not limit an agency's power to terminate or otherwise discipline its employees. Likewise, agency action does not preclude the board from exercising its powers and duties.

Subdivision i. Annual report. Subdivision i requires the board to issue an annual report detailing its activities during the past year, in accordance with the provisions for issuance of annual reports contained in section 1112 of the charter. This annual summary is intended to be of use to the mayor, the Council and the public in determining whether the board is faithfully executing its responsibilities and may also be useful to the board as a review process for determining whether its personnel and resources are adequate and operating efficiently. For example, the board has been given discretion in certain instances to determine whether it will act on a complaint having merit or send it to the agency for disposition. As a means of determining whether board resources are sufficient to

handle the cases meriting review, and a check on that discretion, a summary of the disposition of complaints and referrals received by the board is to be included, without identifying the names of parties involved.

As required by section 1112, the board is required to make its report public. To do so, the board must publish notice of the availability of its annual report and maintain a sufficient supply of each report to respond to requests for copies.

Subdivision k. Confidentiality of board records. Subdivision k retains the language of the chapter "Ethics" regarding confidentiality of the records and files of the board. The provision assures that the board will not be hindered in its prosecutorial function and provides those public servants whose conduct is being reviewed with adequate protection of their privacy. The documents of the board shall be maintained as confidential unless specifically required to be published or made public.

Section 2604. Prohibited interests and conduct. The pre-existing chapter on ethics contained three separate sections on prohibited interests and conduct (sections 2604, 2605 and 2606) each of which applied to different categories of public servants. The first of these sections contained several subdivisions, and each of these applied to a different group of city employees. The commission has eliminated this confusing form of organization in

favor of a single list of prohibited interests and conduct. Except where specifically provided, the prohibitions apply uniformly to all public servants.

Subdivision a. Prohibited interests in firms doing business with the city. Subdivision a governs the holding of an interest, as defined by section 2601, in a firm which the public servant knows is engaged in "business dealings with the city" (also defined by 2601). This subdivision replaces the prohibition regarding the holding of a "substantial" interest in a firm doing business with the city or the holding of an interest in a firm whose business dealings with the city constitute a substantial part of its total business activity. By substituting the imprecise concept of a "substantial" investment with a bright-line rule, the commission seeks to provide public servants with clear guidance concerning the lawfulness of their activities.

Paragraph one. Public servants who are regular employees are subject to a broader prohibition than those who are not. Subparagraph (a) states that no public servant may have an interest in a firm doing business with his or her own agency, while subparagraph (b) provides that no regular employee may have an interest in a firm doing business with the city, regardless of the agency involved. Regular employees may, however, hold ownership interests in publicly-traded firms doing business with agencies other than the one they serve. This exception was made in recognition of the fact that a public servant is not likely

to be able to influence the value of such interest by any official action. (By its definition, the term "ownership interest" excludes other forms of ownership in blind trusts and similar holdings where the public servant does not have knowledge of, or control over, the disposition of the interest.)

Subparagraph (a) also makes clear that community board members are not prohibited from having interests in firms which may be affected by an action of a community board. Indeed, members of community boards are selected to reflect the interests of the community and may include representatives of the local business community, who may or may not reside in the area. To prohibit members from having interests in firms whose activities are subject to review by a community board would deprive the community boards of this desired diversity. Section 2604(b)(1) nevertheless prohibits community board members from voting on any matter before the community board which may result in a personal and direct economic gain. This exception does not waive the general prohibition against having an interest in firms doing business with the community board itself, e.g., by contracting with, or otherwise providing services to, the community board.

Paragraph two. This provision gives public servants the opportunity to determine whether a firm is engaged in business dealings with the agency they serve. It is intended that when a public servant fails to obtain such a determination, and the information would have been available if it were requested, the

board may find that the public servant should have known of the business dealing.

Paragraph three. The commission recognizes that exceptions to the prohibitions of paragraph one may be justified under certain circumstances. Paragraph three identifies four situations in which a public servant may request the board to determine whether, and in what form, an otherwise prohibited ownership interest may be retained. The commission has deliberately chosen not to allow a board waiver to permit a public servant to acquire an interest in a firm which the public servant knows has business dealings with the city.

The four circumstances when this procedure may be used are as follows.

1. Individuals entering public service - In recognition of the fact that individuals recruited into public service may have acquired interests prohibited by this subdivision prior to considering public service, and given that some of these individuals would not accept public employment if forced to divest themselves of all such interests, they are permitted to request the board to allow them to maintain such interests, in some form.

2. Individuals who lacked prior knowledge that firms in which they hold interests are engaged in business dealings with the city - In instances where a public servant did not know, but later gains knowledge, that a firm in which he or she has an interest is engaged in a business dealing with the city such that

the interest would be prohibited, the board may be requested to rule upon the disposition of the interest.

3. Public servants having interests in firms which subsequently enter into business dealings with the city - When a public servant has an interest in a firm which plans on entering into a business dealing with the city, the public servant may seek the board's opinion as to the disposition of the interest.

4. Public servants who acquire prohibited interests by operation of law - When a public servant inherits or otherwise acquires a prohibited interest by operation of law, he or she is provided an opportunity to have the board review the disposition of that interest.

Under each of these circumstances, the public servant has the option of either divesting the interest or requesting the board for an opinion. In the case of divestiture at the public servant's option, the divestiture must occur within ten days of the time the public servant has knowledge of the business dealing with the city, except in the case of an individual who plans on becoming a public servant, in which case divestiture must be prior to taking public office. If ten days is not sufficient time for the public servant to divest, the public servant may ask the board for an opinion as to the proper disposition of the interest prior to the end of the ten day period, without limiting the public servant's ability to divest at a later date, during the time the board is considering the public servant's request.

Paragraph four. Where a public servant falling into one of the above described categories discloses an interest to the board, the board is required to review the matter and to issue an order setting forth its determination as to whether or not such interest, if maintained, would be in conflict with the proper discharge of the public servant's official duties. If the board determines that a conflict exists, it shall require divestiture or such other action as it deems appropriate which may mitigate the conflict. In doing so, the board must take into account the financial burden of its decision on the public servant. Short of divestiture, the board may, for example, require the public servant to place the interest in a blind trust or abstain from taking any action regarding that interest, both in that individual's capacity as a public servant and as an owner of the interest. It is anticipated, however, that in most cases the board will not allow a public servant to maintain the interest unless considerable hardship would result if the public servant were forced to divest.

Paragraph six. As stated previously, interests are prohibited only if the public servant has knowledge of the firm's business dealing with the city. However, under paragraph six a public servant is deemed to have knowledge of the business dealing if the public servant should have known of such business dealing; actual knowledge is not required in order to find that a violation occurred. Penalty provisions of the chapter specify, however, that there can be no misdemeanor conviction unless the

public servant had actual knowledge of a business dealing with the city.

Subdivision b. Prohibited conduct. Paragraph one of subdivision b provides that a public servant with an interest not prohibited by subdivision a is, with certain exceptions, prohibited from taking any action, as a public servant, which would particularly affect that interest. Thus, public servants are prohibited from taking official actions particularly affecting interests they hold which fall below the $25,000/5% threshold, and are prohibited from taking actions regarding interests which they may be permitted to hold by an order of the board issued pursuant to paragraph four of subdivision a.

The prohibition applies to actions which "particularly" affect an interest. Thus, for example, the grant of a discretionary benefit such as a commercial rehabilitation loan, which is made available to one firm and not to all others similarly situated, may be considered an action "particularly" affecting an interest.

Subparagraph (a) provides that the prohibition does not apply to elected officials. Requiring elected officials to recuse themselves in these situations would prevent them from executing the essential functions they have been elected to perform. Disclosure only is required.

Subparagraph (b) makes clear that appointed community board members are not prohibited from participating on their community boards regarding matters coming before the community

board which may particularly affect an interest they possess, provided that they may not vote on the matter if community board action might result in a personal and direct economic gain. Discussing the matter with other members and at meetings is not prohibited.

Subparagraph (c) provides an exception from the recusal requirement for all public servants in the case of interests of value under $10,000. Actions particularly affecting such interests are not prohibited, provided that disclosure is made to the board before an action is taken.

Paragraph two continues the general prohibition against engaging in any business, transaction or private employment, or having any financial or other private interest, which is in conflict with the proper discharge of official duties. The commission has retained this "catch-all" prohibition in recognition of the fact that the specific prohibitions set forth in the chapter cannot address all conflict of interest situations which may arise in the future and that the board must retain the flexibility to handle new situations as they arise. However, fairness to public servants dictates that no punishment be imposed for actions not previously identified as prohibited. Accordingly, the penalties provision of the chapter provides that no penalties may be imposed for a violation of paragraph two unless such violation involved conduct identified by rule of the board as prohibited. Thus, the board may in some situations adjudicate a public servant to be in violation of paragraph two

without imposing any penalties.

Paragraph three remains the same as the pre-existing charter prohibition contained in section 2604(c)(2).

Paragraph four remains essentially the same as the pre-existing charter prohibition contained in section 2604(c)(6). The clause "which is obtained as a result of the official duties of such public servant and which is not otherwise available to the public" has been added to assist public servants in identifying that information which is protected by this provision. A proviso has also been added to make clear that this section may not be used against whistle-blowers who disclose confidential information regarding waste, inefficiency, corruption, criminal activity or conflict of interest.

Paragraph five is similar to pre-existing charter section 2604(b)(3) with the following changes.

*The term "valuable gift" is to be defined by the board.

*Such gifts may not be accepted from firms or individuals if the public servant knows they intend to enter into business dealings with the city.

*An exception is provided for gifts which are customary on family or social occasions, in order that public servants be allowed to receive gifts from family members or close personal friends. It is the commission's intent that family and social occasions be construed narrowly so that the exception may not be used as a loophole to the general prohibition.

Paragraph six represents a merger of two pre-existing charter prohibitions contained in sections 2604(b)(4) and 2604(c)(5). The prohibitions are modified to prohibit only such representations as are made for compensation. Representing a co-op board or community group before the city without compensation is not prohibited by this section. For public servants who are not regular employees, the prohibition applies only to representation before the agency they serve. Such individuals may therefore represent private interests for compensation before any city agency other than the one they serve.

Paragraph seven remains the same as pre-existing charter section 2604(b)(5), with the added proviso that this section may not be used to prohibit public servants from acting as counsel for elected officials in any litigation in which the elected official has standing and authority to participate by virtue of his or her capacity as an elected official. For public servants who are not regular employees, this prohibition applies only to the agency served by the public servant.

Paragraph eight remains essentially the same as pre-existing charter section 2604(b)(6), except that the prohibition now extends to any civil litigation brought by or against the city. For public servants who are not regular employees, the prohibition applies only to the agency served by the public servant.

Subparagraph (a) of paragraph nine is the same as pre-existing charter section 2604(c)(4). Subparagraph (b) is a new

prohibition, which bars a public servant from requesting any subordinate public servant to participate in political campaigns. Subordinates are not limited to individuals directly under and reporting to the public servant, but include all individuals in lower positions in the organizational hierarchy of the agency, whose work the public servant has the power to direct or whose terms and conditions of employment the public servant has the power to affect.

This prohibition is included in the conflict of interest standards to protect public servants from the actual or perceived pressure to respond to a request from a superior to engage in campaign work. Nothing prohibits any public servant from volunteering to participate in a political campaign.

The definition of "participation in a political campaign" makes clear that public servants are not prohibited from requesting their subordinates to undertake actions related to matters within the duties or responsibilities of such subordinates, whether or not the actions or their results may be used in the course of a political campaign. Thus, elected officials are not prohibited from requesting a public servant for statistics or reports on activities for which the public servant is responsible simply because such statistics or reports are to be relied on in the course of a campaign. Similarly, nothing would prohibit a public servant from requesting a subordinate to speak on behalf of an elected official who is campaigning for reelection or other public office, regarding matters within the

subordinate's area of responsibility.

Paragraph ten continues the prohibition which appeared in pre-existing charter section 2606.

Subparagraphs (a) and (b) of paragraph eleven contain the prohibitions which appeared in pre-existing charter section 2606. Subparagraph (c) is new. This subparagraph prohibits a public servant from requesting a subordinate to pay any political assessment, subscription or contribution. Nothing prohibits a subordinate public servant from voluntarily making such political contributions.

Paragraph twelve contains a new prohibition which prohibits certain high-level public servants from requesting anyone - whether another public servant or a private party - to pay any political assessment, subscription or contribution for any candidate for an elective office of the city or for any elected official, as the term is elsewhere defined, who is a candidate for any elective office. The prohibition applies to an individual who holds office as a deputy mayor or agency head, or who, as defined by board rule, is charged with "substantial policy discretion". The prohibition does not, however, apply to elected officials. The prohibition recognizes the actual or implied coercion which may exist when people in policy-making positions raise money for political campaigns. The prohibition not only applies to solicitations for candidates for elective offices of the city but would also, for example, prohibit solicitations on behalf of the mayor in a race for state or

federal office.

The prohibition applies to any request, whether made "directly" or "indirectly". Individuals subject to the prohibition cannot escape its application by having others make the solicitations on their behalf. The provision makes clear, however, that speaking on behalf of an elected official at a function where solicitations may be made by others is not in and of itself prohibited.

Paragraph thirteen continues a portion of the prohibition found in pre-existing charter section 2607. That portion of current charter section 2607 which did not pertain to conflicts of interest has been moved to the chapter on officers and employees.

Paragraph fourteen contains a new prohibition against public servants engaging in business or financial relationships with superiors or subordinates. The commission added this prohibition in recognition of the potential for coercion or favoritism that exists when co-workers who occupy different positions in the hierarchy enter into business or financial relationships. Thus prohibited are jointly-run business ventures, and financial relationships such as loans. The prohibition is not intended to prevent public servants from loaning each other insignificant amounts of cash, as occurs often in normal daily events.

Subdivision c. Exceptions to prohibited interests and conduct. Subdivision c remains essentially the same as pre-

existing charter section 2604(f), except that: paragraph one is extended to all elected officials including but not limited to members of the Council; paragraph three is added; paragraph six contains the provisions of pre-existing charter section 2604(f)(4) regarding participation by public servants in the activities of entities operating on a not-for-profit basis, with changes which (i) allow elected officials to assume positions in not-for-profit entities engaged in business dealings with the city, (ii) allow for an agency waiver of the requirement that the not-for-profit with which the public servant is affiliated not have any business dealings with the agency served by the public servant, where it is determined that the activity would be in furtherance of the purposes and interests of the city, and (iii) eliminate the approvals required by the agency head, commissioner of investigation and Board of Ethics; and paragraph eight is added.

Subdivision d. Post-employment restrictions. Subdivision d contains restrictions upon the activities of public servants who leave city employment, and restrictions upon the solicitation of, negotiation for, and acceptance of job opportunities by public servants while still in city employment.

Paragraph one continues the provisions of pre-existing charter sections 2604(g) and (i) without revision, except that clause (ii) of paragraph one extends the application of section 2604(i) to all public servants.

Paragraph two is a new provision which prohibits all former public servants, with limited exceptions, from appearing before their own agencies for one year after they leave city service. Appearances, defined by section 2601(4), include all communications made for compensation, such as telephone calls, letters, testifying at public hearings or attending meetings on behalf of a client. Nothing in this provision prohibits a former public servant from representing a client in a matter that involves such person's former agency provided that no communication, direct or indirect, is made with the agency. For the purposes of this provision, the "agency served" includes the Board of Estimate for those persons designated by members of the Board of Estimate to sit for them at the Board of Estimate.

Paragraph three bans top-level city officials from appearing before an agency in the branch of government they served for a one year period after leaving city employment.

Paragraph four prohibits public servants, at any time after leaving city employment, from making appearances or accepting compensation for services, regarding any particular matter with respect to which the public servant had participated in "personally and substantially" while in public service. The ban applies to any appearance whether or not made for compensation.

In view of the permanent character of this prohibition, a public servant's degree of involvement with a "particular matter" must have been substantial in order for this provision to

apply. The pre-existing charter's three-year prohibition applied to any matter with respect to which the public servant was "directly concerned, or in which he had personally participated, or which was under his active consideration". By contrast, the new chapter applies the prohibition to particular matters with respect to which such person "had participated in personally and substantially as a public servant through decision, approval, recommendation, investigation or other similar activities". This change is intended to make clear that activities which make only an insignificant contribution to the final disposition of a matter, such as typing a contract or performing other ministerial matters, do not constitute a sufficient level of involvement for the post-employment ban to apply.

For this reason, the commission has excluded from the scope of the prohibition those matters with respect to which "special knowledge or information" was made available to the public servant as a result of such person's city employment, which had been covered by the former charter provisions. Having special information or knowledge with respect to a particular matter is, on its own, not a sufficient form of involvement to merit application of the perpetual post-employment ban.

Paragraph five contains a new prohibition against disclosure of confidential information after leaving public service.

Paragraph six includes an exception to the post-employment prohibitions for positions with, or

representations on behalf of, any local, state or federal agency. This would include any employment with or service provided as an attorney or consultant to such agency.

Subdivision e. Board waiver of employment prohibitions. Subdivision e of the section permits a public servant to obtain a waiver from the prohibitions upon the holding of positions (including those which apply during city service and the post-employment prohibitions) when the board finds that holding the position would not be in conflict with the purposes and interests of the city, and where written approval is given by the agency head. This provision is intended to give relief in otherwise inequitable situations.

Section 2605. Reporting. This section contains the prohibition found in pre-existing charter section 2604(c)(3).

Section 2606. Penalties. Penalties for violations of the conflict of interest provisions are set forth in section 2606. Subdivision a permits the board to void any transaction affected by conflicts of interest, after consultation with the head of the agency involved. Under pre-existing charter section 2604(j), this power resided in the comptroller.

Subdivision b establishes the civil penalties which may be imposed by the board upon a finding that a violation has occurred. The subdivision allows up to $10,000 in fines. The board is not itself authorized to suspend or remove a public

servant from office, but may recommend such to the appointing officer.

Subdivision c continues the penalties for criminal prosecution of violations provided for by the pre-existing charter sections 2604(1), 2605, 2606 and 2607. Subdivisiom c also provides that a public servant must be found to have had actual knowledge of a business dealing with the city in order to be found guilty of a misdemeanor for violation of section 2604(a) of the charter. Subdivision d provides that no penalties may be imposed for a violation of section 2604(b)(2) of the charter unless the violation involved conduct identified by rule of the board as prohibited by that provision.