CITY OF NEW YORK
CONFLICTS OF INTEREST BOARD

Notice of Opportunity to Comment on Proposed Rule Establishing Procedures to Appeal a Designation as a Required Filer of a Financial Disclosure Report

NOTICE IS HEREBY GIVEN PURSUANT TO THE AUTHORITY VESTED IN the Conflicts of Interest Board by Section 2603(a) of the New York City Charter and Section 12-110(c)(2) of the New York City Administrative Code that the Conflicts of Interest Board intends to adopt a rule, Section 1-17 of Title 53 of the Rules of the City of New York, establishing procedures to appeal a designation as a required filer of a financial disclosure report pursuant to Section 12-110(b) of the Administrative Code. The proposed rule is set forth below.

Written comments regarding this proposed amendment may be sent to the office of Julia Davis, Director of Financial Disclosure and Special Counsel, Conflicts of Interest Board, 2 Lafayette Street, Suite 1010, New York, NY 10007, on or before January 3, 2011. A public hearing will be held on January 3, 2011, from 9:00 a.m. to 5:00 p.m., at the foregoing address. Persons seeking to testify are requested to notify Ms. Davis at the foregoing address or by email to davis@coib.nyc.gov. The public may also submit comments on the rule electronically through NYC RULES at www.nyc.gov/nycrules. Written comments and a summary of oral comments received at the hearing will be available for public inspection, within a reasonable time after receipt, between the hours of 9:00 a.m. and 5:00 p.m., at Ms. Davis's office.

Title 53 of the Rules of the City of New York is amended by adding a new Section 1-17, to read as follows:

[New matter is underscored]

§1-17 Procedures to Appeal a Designation as a Required Filer of a Financial Disclosure Report

(a) Applicability.

Any employee designated as a required filer by his or her agency may appeal the determination that he or she is required to file a financial disclosure report with the Conflicts of Interest Board ("the Board") pursuant to New York City Administrative Code § 12-110, first to his or her agency head and then to the Board.

(b) Appeal to the Agency Head.

(1) Any employee seeking to appeal the determination that he or she is required to file a financial disclosure report shall complete a "Notice of Appeal to Agency Head," on such form as the Board shall adopt and make available on the Board's website. The completed form shall include the employee's name, employee identification number ("EIN") or agency identifier, agency name, agency code, civil service title, office title, and a brief statement of the grounds for the appeal.

(2) An employee seeking to appeal such agency determination shall file, in the manner designated by the agency, the completed Notice of Appeal form with his or her agency financial disclosure liaison prior to the deadline for filing his or her financial disclosure report but in any event the employee shall have no fewer than twenty-one days within which to file such Notice of Appeal after receiving the notification by the agency that he or she must file a financial disclosure report. Failure to file the Notice of Appeal by the later of twenty-one days after such notification or the deadline for filing, as the case may be, shall constitute a waiver of the right to appeal and the employee will be required to file a financial disclosure report.

(3) Upon receipt of the completed Notice of Appeal, the agency financial disclosure liaison shall:

(i) Time and date stamp the Notice of Appeal form;

(ii) Provide the employee with a copy of such time and date-stamped form as a receipt;

(iii) Transmit the Notice of Appeal form forthwith to the agency head or his or her designee; and

(iv) Within five days of the receipt of the Notice of Appeal, notify the Board by e-mail of the pendency of the appeal and the date that the appeal was received by the agency. Such notice to the Board shall contain the employee's name, agency, EIN (or agency identifier), and the date that the appeal was filed.

(4) No later than fourteen days after filing the Notice of Appeal, the employee shall submit to his or her agency head or such agency head's designee a written statement and any documentation in support thereof setting forth the reasons that such employee believes he or she should not be designated as a required filer of a financial disclosure report. Failure to submit such written statement within such fourteen-day period shall constitute a waiver of the right to appeal.

(5) Within fourteen days of the agency's receipt of the employee's written statement, the agency head or his or her designee shall advise in writing or by email the employee, his or her employee's collective bargaining representative, attorney or other representative, if any, and the Board of the agency's decision as to whether or not the employee is required to file. If the agency head or the agency head's designee fails to meet such fourteen-day deadline, the appeal shall be deemed granted upon default.

(6) A decision of the agency head or his or her designee that denies an appeal shall set forth the reasons for and evidence relied upon in reaching such decision. Such denial shall be predicated on a showing that the employee meets the requirements of at least one of the filing categories set forth in New York City Administrative Code § 12-110(b)(3)(a)(3)-(4) and §§ 1-02, 1-14, and 1-15 of the Board's rules. If the agency denies the appeal, the notice to the Board shall state the manner by which the employee was notified and the date of such notification.

(7) The agency head or his or her designee may consult with the Board prior to rendering its decision.

(c) Procedure Upon Agency's Grant of Appeal.

If the agency grants the employee's appeal, the employee's name shall be removed from the Board's list of required filers and the employee will not be required to file a financial disclosure report for that filing year or in future years until or unless the employee's title, position, duties, or responsibilities change in such a way that he or she would be required to file pursuant to the criteria set forth in New York City Administrative Code § 12-110(b).

(d) Procedure Upon Agency's Denial of Appeal.

(1) An employee whose appeal is denied by his or her agency shall, within thirty days after service of the agency's notice of denial, either:

(i) file a completed financial disclosure report with the Board, or

(ii) file with the Board and with the employee's agency head or his or her designee a completed "Notice of Appeal to Board," on such form as the Board shall prescribe and make available on the Board's website.

Failure to file either a financial disclosure report or an appeal with the Board within the thirty-day period shall constitute a waiver of the right to a further appeal and shall subject the employee to the imposition of the statutory late filing fine pursuant to Ad. Code § 12-110(g).

(2) Within thirty days after filing of a Notice of Appeal to the Board, the employee shall file with the Board and file with the employee's agency head or his or her designee the following materials:

(i) A copy of the statement and any supporting materials previously submitted to the agency head by the employee on the appeal in accordance with paragraph one of subdivision (a) of this section;

(ii) A copy of the agency head's decision on such appeal; and

(iii) Any supplemental documents the employee elects to provide.

(3) Within thirty days after the employee files the materials set forth in paragraph two of this subdivision, the agency shall file with the Board all materials relied upon by the agency in making its determination that the employee is required to file a financial disclosure report, as well as any additional documents in support of the agency's determination.

(4) Within thirty days after the agency has filed the materials set forth in paragraph three of this subdivision, the employee may file with the Board such additional materials as he or she deems necessary to either rebut evidence produced by the agency or otherwise support his or her position.

(5) The Board's Director of Financial Disclosure shall review the agency's determination and the documents submitted by the employee and the agency and shall make a recommendation to the Board, or to the Executive Director upon delegation by the Board, as to whether the agency's determination should be upheld or reversed. The agency and employee shall each be

served with a copy of the recommendation of the Director of Financial Disclosure and, within thirty days of service of the recommendation, may submit written comments to the Board or Executive Director, as the case may be, upon the proposed recommendation.

(6) In the event that the Board, in its sole discretion, determines that issues are presented by the written materials filed on the appeal that require an evidentiary hearing, the Board may order such a hearing before the full Board, or, in the discretion of the Chair, before a member or members of the Board or before the Executive Director, designated for that purpose, at which the employee and agency may call witnesses to testify under oath to determine any such issue. If the Board requests additional information, both the employee and the agency shall provide to the Board whatever additional information it requests, within fourteen days after service of such a request in writing or by email by the Board. Failure of either party to timely provide any of the requested information may result in a summary finding adverse to that party.

(7) The Board or the Executive Director, as the case may be, shall review the recommendation and any comments submitted in response thereto and issue a decision and order either upholding or reversing the agency's decision.

(8) If the Board grants the appeal, the employee's name shall be removed from the Board's list of required filers and the employee will not be required to file a financial disclosure report for that filing year or in future years until or unless the employee's title, position, duties, or responsibilities change such that he or she would be required to file pursuant to the criteria set forth in New York City Administrative Code § 12-110(b).

(9) If the appeal is denied, the employee shall either:

(i) file a financial disclosure report for that filing year within thirty days after service of the denial of the appeal by the Board, and shall file for future years

until or unless the employee's title, position, duties, or responsibilities change such that he or she would not be required to file pursuant to the criteria set forth in Administrative Code § 12-110(b); or

(ii) commence, within the time provided by law, an Article 78 proceeding to review the Board's decision.

(e) General Provisions

(1) At all stages of the financial disclosure appeals process, the employee may be represented by a union representative, an attorney or other representative.

(2) Once an employee files an appeal with the Board, neither the employee nor the agency or their respective representatives may communicate *ex parte* with any member of the Board staff or Board with respect to the matter, except on consent of the opposing party or in an emergency.

(3) During the pendency of the appeal and any court proceeding timely brought by the employee to review a denial of the appeal by the Board, the employee need not file a financial disclosure report, and no late filing fines will be assessed for that period.

(4) Whenever a deadline in the process set forth in this section is measured from the filing or service of notice and notice is filed or served by United States Postal Service mail, five days shall be added to the deadline.

(5) The Board may, in its discretion and for good cause shown, extend any deadline set forth in this rule. An application for such extension must be made in writing and prior to the expiration of the deadline.

(6) In the case of any appeal that is decided upon default, whether in favor of the employee or the agency, that decision shall apply to that filing year only and shall not be a determination on the merits.

(7) Unless otherwise stated, any reference to a number of days specified as a period within which an act is required to be done means such number of calendar days.

(8) Nothing in this rule shall prevent the Board from determining, pursuant to New York City Administrative Code § 12-110(b)(3)(a)(2)-(3), that any public servant, regardless of an agency's determination, is required to file a financial disclosure report.

STATEMENT OF BASIS OF PURPOSE OF THE PROPOSED RULE

As mandated by New York City's Financial Disclosure Law (Administrative Code § 12-110), the Conflicts of Interest Board (the "Board") must adopt a rule addressing appeals by public servants who contest their designation as required filers based on their policymaking or contracting responsibilities. See Ad. Code § 12-110(c)(2), as amended by Local Law 43 of 2003. See also Ad. Code § 12-110(b)(3)(a)(3)-(4). Determination of such appeals by employees was initially the responsibility of the Department of Investigation and in 2004 was transferred to the Board. See Ad. Code § 12-110(c)(2), as amended by Local Law 43 of 2003.

Subsequent to the transfer of the determination of appeals to the Board, the City and DC37 entered into a pilot program entitled "Financial Disclosure Appeals Process," which created a procedure for appeals for filers of financial disclosure reports. This rule is based on that process and contains procedures for any employee to appeal a designation as a required filer based on policymaking or contracting responsibilities and for agencies to respond to those

appeals. The rule provides the employee with notice and the opportunity to be heard at each stage of the appeal, and the opportunity to comment on the Board's decision before it is final.

In light of the foregoing, the Board's purpose in promulgating the rule is threefold: (1) to provide all City employees with a comprehensive procedure for appealing their designation as a required filer based on policymaking or contracting responsibilities; (2) to ensure the uniform and prompt resolution of financial disclosure appeals; and (3) to provide guidance, through decisions on these appeals, to agencies as to which categories of employees are required filers as policymakers or contract filers.

The proposed rule was not included in the regulatory agenda because enactment of a financial disclosure appeals rule was not anticipated at the time of publication of agency regulatory agendas.