OUTSIDE ACTIVITIES

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A. Introduction

Many public servants seek to augment their City incomes by taking on second jobs or investing in businesses. Many public servants also seek to continue the spirit of their public service by volunteering for not-for-profit organizations. This chapter will address the rules that must be followed whenever a public servant seeks to perform any activity outside his or her City employment, whether that activity is paid or unpaid.

Among the moonlighting activities the Conflicts of Interest Board has specifically addressed are: teaching; practicing law; engaging in various kinds of contracting work, such as architecture, engineering, electrical work, and plumbing, that might involve representing private interests before the City; and writing books. Charter §§ 2604(a), 2604(b), and 2604(e), which cover these activities, contain the minimum standards of conduct. Some City agencies promulgate and enforce stricter rules.

The Board has consistently advised that the moonlighting restrictions apply not only to active public servants, but also to those on leaves of absence. In 2001 the Board fined a public servant $1,000 for working, while on sick leave, at a firm that had a contract with his City agency.[1] Similarly, in 2013, the Board fined a former Elevator Mechanic Helper for the New York City Housing Authority ("NYCHA") $1,000 for working, while he was on leave from NYCHA, as an Elevator Mechanic Helper for a private firm with NYCHA business dealings.[2]

The Board has also issued a number of advisory opinions on the more general question of who is a "public servant" of the City, that is, opinions that determine whether certain categories of people are subject to the moonlighting restrictions or indeed to any of the restrictions of the conflicts of interest law. For example, in Advisory Opinion Number 93-10 the Board held that Administrative Law Judges of the Parking Violations Bureau were subject to the conflicts of interest law. Similarly, in three opinions issued in 2009, the Board determined that the following persons were subject to the Board's jurisdiction: the trustees and employees of the City's municipal employee pension systems; law firm associates who defer work at their firm to work for a year, at their firm's expense, for City agencies; and the members of the New York City Water Board.[3]

The Conflicts of Interest Board has also issued advisory opinions and orders on the following ownership questions, among others: imputed ownership of a spouse's business; blind trusts; ownership of residential co-operatives or condominiums; and ownership of apartments rented to public assistance recipients. The Charter sections that cover these interests are also

Sections 2604(a), (b), and (e).

Many City employees are involved in, or want to be involved in, volunteering for not-for-profit organizations. Public servants volunteer for religious organizations, bring food to the elderly, work with troubled youth, feed the homeless, and engage in other civic-minded volunteer activities. These activities not only generate goodwill in the City, but also help to improve the quality of life for all City residents. Public servants are not prohibited from volunteering for not-for-profits. There are, however, some restrictions, as discussed below.

B. General Provisions

A public servant shall not engage in any business, transaction, or private employment, or have any financial or other private interest, direct or indirect, that conflicts with the proper discharge of his or her official duties.[4] For example, a public servant may not pursue outside employment on City time or use City equipment, supplies, letterhead, personnel, or other City resources for the outside employment.[5] In 2005 the Board fined a New York City Department of Sanitation ("DSNY") Engineer $2,000 for maintaining on his City computer hundreds of files related to his private building inspection business.[6] Also in 2005, the Board fined a former New York City Department of Education ("DOE") Custodian $1,000 for using personnel and equipment paid for by the DOE for his private business.[7] In 2000, the Board fined the two top officials of the New York City Human Resources Administration ("HRA") $6,500 and $8,500 for, among other things, using City resources and their City subordinates in furtherance of their outside private businesses.[8] In 2007, the Board fined two City employees $2,000 each for violations that included the use of City time for a non-City purpose. In one case, a DSNY Assistant Commissioner promoted his outside travel business and also made calls in support of a mayoral candidate during his City work hours.[9] In the second case, a New York City Housing Authority ("NYCHA") Staff Analyst, over a six-month period, made hundreds of telephone calls and exchanged hundreds of emails during her NYCHA work day in support of several not-for-profit organizations unrelated to her NYCHA employment.[10] In 2009, the Board and the New York City Department of Correction ("DOC"), in a three-way settlement, fined an attorney in the DOC Office of Trials and Litigation $1,800 for, while on City time, using his City computer to store and edit documents related to his private law practice.[11] In 2012, the Board fined a former Engineering Auditor for the New York City Economic Development Corporation ("EDC") $7,500 for, during his EDC work hours, using his EDC computer and e-mail account to perform work for his private sneaker business, including completing 106 seller transactions on eBay, totaling $9,724.99, and hitting the bidding websites bid.openx.net and eBay a combined total of approximately 802 times during each workday over a three-month period.[12]

In 2010, the Board imposed a substantial fine on a public servant who had received the Board's advice that he could own and operate a restaurant, but with an explicit caution that he not use City time or resources in the pursuit of this private enterprise. The Board imposed a $20,000 fine on this public servant, the former Senior Deputy Director for Infrastructure Technology in the Information Technology Division at NYCHA, for his multiple violations of

the City's conflicts of interest law. Despite the prior specific written instructions from the Board, the former Senior Deputy Director proceeded to engage in the prohibited conduct. The Senior Deputy Director admitted that, among his violations, starting in May 2006, often at times he was required to be performing work for the City, he: (a) used his NYCHA computer and e-mail account to send hundreds of e-mails related to the restaurant, in some of which he provided his NYCHA office telephone number and NYCHA cell phone number as his contact information for the restaurant; (b) created and/or saved at least thirteen documents on his NYCHA computer related to the restaurant; (c) used his NYCHA office telephone to make approximately 800 calls to the restaurant, totaling 28 hours of telephone time; (d) used his NYCHA-issued Blackberry to make or receive approximately 830 calls to or from the restaurant, totaling 34 hours of telephone time; and (e) used his NYCHA-issued van to make food deliveries for the restaurant. The former Senior Deputy Director also acknowledged that he had resigned from NYCHA while disciplinary proceedings were pending against him for this misconduct.[13]

A 2013 settlement with a DOC Special Operations Officer illustrates that use of City resources for a private purpose may result in a substantial penalty even where the use is not in connection with an outside business or other compensated activity. The Officer admitted that, without authorization, he commuted in a DOC vehicle using DOC gasoline to Rikers Island from his home in Port Jefferson nearly daily over an eight-month period in 2011, for which violation he agreed to pay a $4,500 fine to the Board.[14]

While there is no permissible amount of *City* time that may be devoted to paid private work, the conflicts of interest law does not place any limits on the amount of *non-City* time a City employee may spend on such activity. That said, in responding to requests for advice about outside work, the Board "regularly inquires about the demands and the schedule of proposed outside work" in order to evaluate whether it is credible that the restriction against any use of City time will be observed by the City employee seeking such advice.[15]

In addition, no public servant shall use or attempt to use his or her official City position to obtain any financial gain, contract, license, privilege, or other private or personal advantage, direct or indirect, for the public servant or any person or firm associated with the public servant.[16] "Associated" is defined in Charter § 2601(5) to include the public servant's spouse, domestic partner, child, parent, or sibling; a person with whom the public servant has a business or other financial relationship; and each firm in which the public servant has a present or potential interest. Because a City employee with an outside job is clearly "associated" with his or her private employer within the meaning of the Charter, the City employee must have nothing to do with any of her private employer's City business. In 2004 the Board accordingly fined a NYCHA appraiser $2,000 for hiring her private employer to do work for NYCHA.[17] In 2012, the Board issued a public warning letter to an English as a Second Language teacher who, on his own, enrolled fifteen of his ESL students in the Special Education Services program run by Perfect Score Tutoring, where he worked as a tutor; the Board advised the ESL teacher that, in so doing, he used his City position to benefit a firm with which he was associated.[18]

In Advisory Opinion Number 2002-1, which concerned the financial interests of Mayor Michael Bloomberg, the Board considered whether the major customers of, and the partner of,

Bloomberg L.P., the financial services firm of which the Mayor was the majority owner, were "associated" with the Mayor within the meaning of the Charter. With respect to the customers, the Board reserved that question, finding that the public disclosure of the identities of the firm's 100 leading customers, none of which accounted for more than 4% of the firm's revenue, relieved the Mayor of any obligation to recuse himself from City matters involving those customers. On the other hand, the Board determined that Mayor Bloomberg was "associated" with Merrill Lynch, the minority partner in his firm, and that Chapter 68 required him to recuse himself from matters involving Merrill. Further, in Advisory Opinion Number 2007-4, where the Board reviewed and approved a greater diversity of private investment options for Mayor Bloomberg, the Mayor agreed, in response to the Board's concern that he might be "associated" with certain financial institutions involved in financing distributions to Bloomberg L.P. that would fund those investments, to recuse himself in his official capacity from all matters involving those financial institutions.

No public servant shall disclose any confidential information concerning the City that is obtained as a result of the public servant's official duties and that is not otherwise available to the public, or use any such information to advance any direct or indirect financial or other private interest of the public servant or any person or firm associated with the public servant.[19] A 2011 disposition illustrates the range of what constitutes confidential information: a Motor Vehicle Operator for the New York City Department of Health and Mental Hygiene ("DOHMH") agreed to pay a fine to the DOHMH equal to 15 days' pay, valued at $2,440, for disclosing to a friend that he saw the friend's girlfriend at a DOHMH STD Clinic that the Operator was visiting in the course of his DOHMH duties. Because the names of patients at DOHMH clinics are confidential, the Operator violated the conflicts of interest law by disclosing to his friend that his girlfriend was a clinic patient.[20] In a perhaps more typical, but equally serious, case, the Board and the New York City Department of Parks and Recreation ("Parks") in 2012 concluded a joint settlement with a Parks Construction Project Manager who was suspended for sixty days, valued at approximately $11,478, for disclosing confidential Parks information to a private vendor. The Construction Project Manager admitted that without authorization from Parks he had provided Parks engineer and construction pricing estimates to a private vendor who was in the process of preparing a bid for a Parks construction project. The Construction Project Manager also admitted that, at the time he disclosed the information, the vendor was completing construction on a residence owned by the Construction Project Manager's sister, in which residence the Construction Project Manager then resided.[21] This Charter section (2604(b)(4)) does not, however, prohibit the disclosure of information concerning waste, inefficiency, corruption, criminal activity, or conflict of interest.

Finally, full-time public servants are prohibited from representing private interests for compensation before any City agency or from appearing anywhere, directly or indirectly, on behalf of private interests in matters involving the City.[22] For persons who are public servants but who are not regular, full-time employees of the City, this prohibition extends only to the public servant's own agency. "Appear" is defined in Charter § 2601(4) as making any communication (in person, in writing, or by telephone) for compensation, other than those concerning ministerial matters. "Ministerial matter" means an administrative act, including the

issuance of a license, permit, or other permission by the City, that is carried out in a prescribed manner and that does not involve substantial policy discretion.[23] Although "represent" is not defined in Chapter 68, the phrase "representing private interests before any City agency" means just what it says: acting as a representative of a person or entity to bring an issue before a City agency. Such representation is not prohibited, however, in ministerial matters.

The Board fined a former DOE teacher $750 for, while still employed by the DOE, having an interest in a firm that did business with the DOE and for communicating with the DOE as part of the business, communications that violated the "appearance" ban.[24] As noted above, however, full-time City employees are prohibited from appearing for compensation on behalf of private interests before *any* City agency. Thus, in 2009, the Board fined a DSNY Senior Electrical Estimator $1,000 for twice submitting bids for contracts with the New York City Department of Parks and Recreation on behalf of his private electrical company.[25] In 2011 the Board and the DOE concluded a three-way settlement with a former DOE teacher who was fined $4,000 by the Board for, among other violations, contracting with DOE schools, while still employed by the DOE, for a software product he had developed, in violation of the ban on full-time City employees communicating for private compensation with any City agency.[26] Even uncompensated appearances on behalf of private interests before the City may violate Chapter 68, particularly where, as in appearances before a public servant's own agency, it may appear that the public servant is using his or her City position to private advantage or is otherwise violating the duty of loyalty to the City. Thus, in 2007, the Board issued a public warning letter to a former DOE teacher who, during her tenure at the DOE, made uncompensated appearances on behalf of the parents of three different children at impartial hearings to determine whether the children were entitled to receive special education services from the DOE. The Board advised that it would not have violated Chapter 68 if the teacher had appeared at the hearings as an unpaid fact witness, but that her appearance as an advocate, even an unpaid one, did in fact violate the conflicts of interest law.[27]

C. Outside Activities Where There Are No Business Dealings with the City

1. Moonlighting

A public servant may engage in part-time employment with a person who or firm that has *no* business dealings with the City or with any City agency, provided that the public servant complies with those Charter sections discussed in Section B above. The Board in 2005 accordingly advised that the then Finance Commissioner could, subject to a number of conditions corresponding to these Charter sections, accept a position as a compensated independent member of the board of directors of a publicly-traded real estate investment company that had no business dealings with the City, indeed that owned no real estate in New York City. For the violation, however, of a number of these conditions, among other admitted violations, the Board in 2012 fined the former Finance Commissioner $22,000.[28] There are additional restrictions on public servants who engage in the private practice of law or who serve as expert witnesses, discussed in Section G below.

2. Ownership Interests

A public servant may have an ownership interest in a firm that has *no* business dealings with the City or with any City agency, provided that the public servant complies with the Charter sections discussed in Section B above. In 2012 the Board accordingly advised a Deputy Mayor who had recently joined City service that he could retain his position as an owner of a privately held corporation formed, shortly before he joined City service, for the purpose of investing in small, distressed banks. The corporation did not have any business dealings with the City and did not expect to invest in any bank in New York State.[29] In addition, Charter § 2604(b)(1) provides that a public servant "shall not take any action as a public servant particularly affecting" an otherwise permitted interest. One exception is provided for interests less than $10,000, where interested action *is* permitted, but must be disclosed to the Conflicts of Interest Board.[30] Similarly, in the case of an elected official, certain narrowly-prescribed interested actions are not prohibited, but the elected official must disclose the interest to the Board and, if the matter is before the City Council, on the official records of that body.[31]

3. Volunteer Activities

Public servants are generally permitted to volunteer for not-for-profits that have *no* business dealings with the City. However, such public servants must comply with the general provisions of Charter §§ 2604(b)(2), (b)(3), and (b)(4), discussed in Section B above.

D. Outside Activities Where There Are Business Dealings with the City

The rules in this area are a little different for full-time public servants (called "regular employees") and part-time public servants. Regular employees include "all elected officials and public servants whose primary employment, as defined by rule of the board, is with the city, but shall not include members of advisory committees or community boards."[32]

The Board has defined "primary employment with the City" as "the employment of those public servants who receive compensation from the City and are employed on a full-time basis or the equivalent or who are regularly scheduled to work the equivalent of 20 or more hours per week" and has exempted "(i) members of the City Planning Commission, except for the Chair; (ii) interns employed in connection with a program at an educational institution or full-time students; (iii) persons employed on special projects, investigations or programs, in excess of six months but of limited duration, as the Board shall determine."[33]

1. Moonlighting for Full-time Public Servants (Regular Employees)

No full-time public servant may have a position with a firm that the public servant knows, or should know, is engaged in business dealings with *any* agency of the City, not just the public servant's own agency.[34] "Position" includes not only an officer, director, trustee, employee, or management position with a firm but also an attorney, agent, broker, or consultant to the firm.[35] Consequently, for example, a full-time public servant may not act as an agent or

attorney for any firm that does business with any agency of City government.

The Board in 2008 fined two New York City Department of Correction ("DOC") steamfitters $3,000 each for working for a firm that had business dealings with the City, but not with DOC. The steamfitters each acknowledged that the fact that they were performing their outside work in City parks put them on notice of the firm's City business dealings.[36] Similarly, in 2009 the Board and the Office of Chief Medical Examiner ("OCME") concluded a three-way settlement with an OCME Mortuary Technician who, in 2008, had a position with Building Services International ("BSI"), which firm contracted with OCME to clean its facilities. The Mortuary Technician acknowledged that, on at least five occasions in April and May 2008, he performed work for BSI during times when he was required to be working for OCME. For these violations, the OCME Mortuary Technician agreed to an eleven-day suspension, which had the approximate value of $1,472, to be imposed by OCME.[37]

"Firm" means a "sole proprietorship, joint venture, partnership, corporation or any other form of enterprise, but shall not include a public benefit corporation, local development corporation or other similar entity as defined by rule of the board."[38] Under Advisory Opinion Number 94-1, "firm" includes an individual seeking business on behalf of himself or herself. "Business dealings" with the City means any transaction involving the sale, rental, or disposition of any goods, services, or property, any license, permit, grant, or benefit, and any performance of or litigation with respect to any of the foregoing, but does not include any transaction involving a public servant's residence or a ministerial matter.[39] "Ministerial matter," as noted above, means an administrative act, including the issuance of a license, permit, or other permission by the City, that is carried out in a prescribed manner and that does not involve substantial policy discretion.[40] Note that a public servant is deemed to know of a firm's business dealing with the City if he or she should have known of the business dealing.[41]

In Advisory Opinion Number 2002-1, the Board noted that the *donor* of a gift to the City will not have "business dealings with the City" by virtue of that donation within the meaning of Chapter 68, except in unusual cases like the gift of an untested product.

In the case of *COIB v. Begel*,[42] the former spokesman for the Chancellor of the Board of Education ("BOE") consented to the Board's finding that, for a short time in 1995, he held a prohibited consulting position with a firm engaged in business dealings with the BOE while he also worked for the BOE. The Board imposed no penalty because of mitigating circumstances, including the spokesman's return of the consulting fee, the short time involved, and his having reported the conflict to the Board. In *COIB v. Steinhandler*, however, the Board fined a teacher $1,500 for owning and operating a tour company that arranged tours for public schools, including the school where he taught, an offense similar to that for which the Board imposed a fine of $5,000 in 2008 in *COIB v. Sender*.[43]

A special rule exists for officers of the New York City Police Department ("NYPD"). In its Advisory Opinion Number 98-4, the Board determined that, pursuant to Charter § 2604(c)(5), NYPD officers may participate in the NYPD Paid Detail Program, which permits police officers in the program to work as part-time security guards for private firms and, in so doing, wear their

uniforms.

In Advisory Opinion Number 2005-2, faced with the growing number of charter schools, the Board considered what restrictions Chapter 68 imposes on City employees who wish to moonlight or volunteer for charter schools (a question the Board had reserved in Advisory Opinion Number 2000-1, where it determined that charter schools are not City agencies for the purposes of Chapter 68). In Opinion Number 2005-2, the Board determined that charter schools are not "firms" within the meaning of Charter § 2604(a)(1)(b), so that public servants need not apply for Board waivers in order to work at a charter school; that charter schools are not "private interests" for the purposes of Charter § 2604(b)(6) and are not "not-for-profit corporations" for the purposes of § 2604(c)(6), so that those provisions do not prohibit a public servant who works at or volunteers for a charter school from communicating with the City on behalf of the charter school; but that Charter § 2604(b)(2) may restrict such communications by DOE employees or officials to their DOE subordinates or by certain public servants, such as employees of the DOE's Office of Charter Schools and their superiors, whose official duties require them to oversee charter schools.

2. Moonlighting for Part-time Public Servants

For a public servant who is not a regular, full-time employee of the City, the prohibitions that apply to moonlighting, ownership interests, and volunteer activities extend only to the public servant's *own* agency.[44] That means a part-time employee may moonlight for a firm that does business with any City agency, *except* the employee's own agency. A special rule exists for appointed members of community boards. Community boards are discussed in detail in the chapter devoted to that topic.

In Advisory Opinion Number 2006-1, the Board considered the outside work of a particular group of part-time public servants, the members of the Community Education Councils ("CEC") of the New York City Department of Education ("DOE"). In this Opinion, the Board noted that CEC members who work at companies that do business with the DOE will indeed require a waiver from the Board. The Board went on to state that, upon the written approval of the DOE Chancellor, it will, in appropriate circumstances, grant such waivers to permit CEC members to hold such positions, but it will condition such waivers on the requirements that the member not participate at the CEC in any matter involving his or her outside employer; not communicate on behalf of that employer with staff *of the district* on whose CEC the member sits, or with the staff of any school within that district; not use any DOE equipment, supplies, or other resources in connection with the outside employment; and not use or reveal confidential City information. Similarly, in Advisory Opinion Number 2007-1, the Board announced that in considering applications by former CEC members for waivers of the ban against appearing for one year after leaving City service before the "agency served" by a former public servant, it would as a general matter consider the agency served to be *the DOE district* on whose CEC the member had served.

Not only is a part-time public servant prohibited from having a position with a firm that does business with his or her own agency but, as noted in Section B above, such a public servant

may not communicate on behalf of that firm with his or her City agency. In 2010 the Board fined a former unpaid member of the Board of Directors of the New York City Health and Hospitals Corporation ("HHC"), a part-time public servant, $13,500 not only for having a position with a foreign medical school that had contracts with HHC but also for communicating with HHC employees at different HHC facilities on behalf of the school.[45]

3. Ownership Interests for Full-time Public Servants

No full-time public servant may have an ownership interest in a firm that the public servant knows is engaged in business dealings with *any* agency of the City, not just the public servant's own agency. Note that a public servant is deemed to know of a firm's business dealing with the City if he or she should have known of the business dealing.[46]

As noted above, "firm" means a "sole proprietorship, joint venture, partnership, corporation or any other form of enterprise, but shall not include a public benefit corporation, local development corporation or other similar entity as defined by rule of the board."[47] Under Advisory Opinion Number 94-1, "firm" includes an individual seeking business on behalf of himself or herself. "Business dealings" with the City means any transaction involving the sale, rental, disposition, or exchange of any goods, services, or property; any license, permit, grant, or benefit; and any performance of or litigation with respect to any of the foregoing, but does not include any transaction involving a public servant's residence or a ministerial matter.[48]

On its face, Section 2604(a)(1)(b) appears overwhelmingly restrictive (no ownership interest in any firm doing business with the City of New York), especially in light of the democratization of the stock market through pension plans and other deferred compensation devices. The Charter's definitions, however, starting with the definition of "ownership interest," significantly narrow the scope of the prohibition.

"Ownership interest" means an interest in a firm held by a public servant, or by the public servant's spouse, domestic partner, or unemancipated child, that exceeds five percent of the firm or an investment of $48,000, whichever is less, or five percent or $48,000 of the firm's indebtedness, whichever is less, and any lesser interest in a firm when the public servant, or the public servant's spouse, domestic partner, or unemancipated child exercises managerial control or responsibility regarding the firm.[49] Also excluded, independent of the above, are interests held in any pension plan, deferred compensation plan, or mutual fund if the investments are not controlled by the public servant, the public servant's spouse, domestic partner, or unemancipated child, or in any blind trust that holds or acquires an ownership interest.[50]

In 2006, the Board fined a psychiatric technician at the HHC $2,500 for having an ownership interest in two companies that had business dealings with HHC. The technician was the registered owner of her husband's two companies, each of which bid on a contract with HHC. One was awarded a contract, and the other was disqualified when HHC discovered its employee's interest in the bidder.[51] In 2008, the Board and the DOE concluded a three-way settlement with a former DOE special education teacher who was fined $3,000 by the Board and required by the DOE to irrevocably resign by August 29, 2008, for co-owning a firm engaged in business dealings with the DOE and for appearing before the DOE on behalf of that firm. The special education teacher

acknowledged that, from 2001 through 2006, he co-owned A-Plus Center for Learning, Inc., a special education support services provider that was engaged in business dealings for five years with the DOE. The special education teacher further acknowledged that he appeared before the DOE on behalf of his firm each time his firm requested payment from the DOE for the tutoring services provided by his firm to DOE students.[52]

In Advisory Opinion Number 94-10, the Board examined the investment portfolio of a public servant and determined that his interests in pension funds, deferred compensation plans, and mutual funds were not prohibited ownership interests. The Board determined that, since government entities are not "firms," United States government bonds and Treasury notes are not prohibited ownership interests. In Advisory Opinion Number 2009-7, however, the Board determined that the small number of public servants personally and substantially involved in the issuance and management of City debt securities, most of whom work at the City's Office of the Comptroller, the Office of Management and Budget, or the Law Department, could not buy, sell, or hold such securities for their own accounts or for the accounts of any persons or firms associated with them.

In Advisory Opinion Number 94-18, the Board determined, among other things, that a public servant could retain his ownership interest in his investments and assets, provided he placed them in a blind trust established in accordance with the Board's Blind Trust Rule (Board Rules § 1-05). The Board also approved blind trust arrangements in Advisory Opinion Numbers 94-25 and 94-26.

In Advisory Opinion Number 2003-7, in considering the financial interests of then Deputy Mayor Daniel Doctoroff, both the Board and Deputy Mayor Doctoroff recognized that placing assets into a blind trust will not always fully satisfy the requirements of the City's conflicts of interest law. Taking a cue from the parallel federal ethics regulations, the Board noted that, at the establishment of a blind trust, the public servant knows what assets the trust holds and could therefore take, or could appear to be taking, official action to benefit those assets. Thus, except in the case of a diversified portfolio of readily marketable securities, the public servant will be required to recuse himself or herself from taking official action involving the trust's assets. However, in order that the public servant's recusal will not extend beyond the time when he or she has a beneficial interest in an asset placed into blind trust, the trustee will be permitted to inform the public servant when the trust no longer holds an interest in a particular asset, at which time the public servant's obligation to recuse with respect to that asset ceases. The Board accordingly determined that the blind trusts established by Mr. Doctoroff satisfied the conflicts of interest law, provided that Mr. Doctoroff recuse himself from all matters involving certain listed holdings placed into trust unless and until the trustee informed him that he no longer had a beneficial interest in any particular holding.

Finally, the ownership rule does not apply, by its terms, to ownership in publicly traded companies, defined as "a firm which offers or sells its shares to the public and is listed and registered with the Securities and Exchange Commission for public trading on national securities exchanges or over-the-counter markets."[53] This exception does not apply, however, to publicly traded companies having business dealings with the employee's own agency.

Prior to acquiring or accepting an interest in a firm whose shares are publicly traded, a public

servant may submit a written request to the head of the agency served by the public servant for a determination as to whether the firm is engaged in business dealings with the agency. That determination must be in writing, must be rendered expeditiously, and shall be binding on the City and the public servant with respect to the prohibition against having an ownership interest in a firm doing business with the public servant's agency.[54]

4. Ownership Interests for Part-time Public Servants

For a public servant who is not a regular, full-time employee of the City, the prohibitions discussed above extend only to the public servant's *own agency*.[55] This means that a part-time employee may have an ownership interest in a firm that does business with any City agency *except* the employee's own agency.

The definition of "ownership interest" is discussed in Section B above and includes the proviso that the publicly-traded-shares exception does not apply to shares in a firm that does business with one's own agency. Ownership of such shares, therefore, if valued over $48,000 and not held in some excepted form such as a blind trust or a pension plan is prohibited.

A special rule exists for appointed members of community boards.[56] Community boards are discussed in detail in a chapter devoted to that topic.

5. Special Rule for Condominiums and Cooperatives

Public servants may retain their ownership interests in, and generally sit on the boards of directors of, the cooperative or condominium apartments where they reside. In Advisory Opinion Number 92-7, the Board observed that mere ownership in a cooperative that does business with the City is *not* proscribed by Chapter 68, since "any transaction involving a public servant's residence" is by the terms of Charter § 2604(8) excluded from the definition of "business dealings with the city." In Advisory Opinion Number 95-25, the Board also stated, among other things, that ownership of real estate, without more, does not constitute business dealings with the City.

Advisory Opinion Number 92-7 notes, however, the potential for misuse of a public servant's City position and therefore advises public servants to comply with Charter § 2604(b)(3) by, among other things, not communicating with their own City agencies on behalf of their condominiums and cooperatives. Thus, in 2010, the Board fined a New York City Department of Housing Preservation and Development ("HPD") Project Manager $2,000 for communicating with several HPD employees on behalf of a cooperative corporation, while he was the president of the cooperative's board of directors, in an effort to get his cooperative out of paying to HPD 40% of the profits of sales of its apartments.[57] Advisory Opinion Number 92-7 further advises agency heads and high-level public servants not to serve on these cooperative or condominium boards when their agencies are likely to come into contact with their buildings. One exception to this rule against board membership exists, as pointed out in Advisory Opinion Number 94-27, where the public servant's official duties are sufficiently removed from the regulation of private cooperative corporations and related issues, and the public servant recuses himself or herself, as a cooperative board member, from any matters involving the City. By contrast, in Advisory Opinion Number 95-11, a public servant was not allowed to serve as an officer and as a member of the board of directors

of the cooperative corporation where he resided while the cooperative was applying for a loan through the City agency where the public servant was employed.

6. Volunteering for Not-for-Profit Organizations Having Business Dealings with the City

Charter § 2604(c)(6) provides that a public servant may work as an attorney, agent, broker, employee, officer, director, or consultant for any not-for-profit corporation, or other such entity that operates on a not-for-profit basis, interested in business dealings with the City, subject to certain conditions. First, the public servant may take no direct or indirect part in the organization's business dealings with the City. Recusal, as defined in Advisory Opinion Number 92-5, means not voting on or participating in the discussion of any matters that involve the not-for-profit's business dealings with the City. This includes, but is not limited to, agency discussions, meetings with City officials, and receiving copies of relevant documents.

Second, the public servant's agency must not have any business dealings with the not-for-profit organization, unless the public servant's agency head (or the Mayor if the public servant is an agency head) determines that the public servant's proposed activity is in furtherance of the purposes and interests of the City. This approval need not be submitted to the Board.

Third, the public servant may work for the organization only during his or her own time (*i.e.*, not during his or her City work hours). Fourth, the public servant may not receive any compensation for this work.

Failure to comply with these requirements can result in Board penalties, even when the public servant has not received any compensation or personal benefit from his or her work for the not-for-profit organization. For example, in 2008 the Board fined the former Director of the Call Center for the New York City Department of Health and Mental Hygiene ("DOHMH") $7,500 for (a) serving as an *unpaid* member and Vice-Chair of the Board of Directors of a not-for-profit organization with substantial business dealings with the City, including with an agent of DOHMH; (b) being directly involved in that not-for-profit's City business dealings; (c) performing work for the not-for-profit while on City time and using City resources, such as her DOHMH computer, e-mail account, and telephone; (d) hiring a subordinate DOHMH employee to perform work for that not-for-profit; and (e) directing her subordinate to perform some of that work on City time.[58] Similarly, in 2013, the Board and the New York City Administration for Children's Services ("ACS") concluded a joint settlement with an ACS employee to address violations related to his long-term role on the board of a not-for-profit with business dealings with ACS. In addition to failing to have the required approval of the ACS Commissioner for this board service, this employee, during times he was required to be performing work for ACS, used his City computer and e-mail account to send, receive, and store a number of e-mails related to the not-for-profit. The ACS employee also used his City position to obtain a criminal history check and a criminal background check on the not-for-profit's employees. Finally, he asked another ACS employee to run a license plate for him and then used the confidential information he thereby obtained for a personal, non-City purpose. For these violations, ACS reassigned the employee from his prior position to his underlying civil service title, in connection with which his annual salary was reduced from $111,753 to $77,478.[59]

In Advisory Opinion Number 99-1, the Board considered a request from public servants who are also elected officials regarding their *ex officio* membership on boards of directors and also asking whether they may designate members of their staff to serve *ex officio* in their place. The Board determined that elected officials may serve *ex officio* without first obtaining a waiver from the Board and that they may also designate, in writing, members of their staffs to serve on their behalf as *ex officio* members or directors of not-for-profit organizations. In Advisory Opinion Number 2009-2, however, the Board cautioned that the mere assertion that an elected official's membership on a not-for-profit board is *ex officio* will be insufficient and that the Board would closely examine the circumstances of each case to determine whether holding the board position was indeed part of the elected official's duties rather than a personal activity.

The Board, in Advisory Opinion Number 98-8, determined that public servants who are volunteering for not-for-profits that engage in business dealings with their own agencies do not need either agency head approval or Board approval where the public servant has no policy-making or administrative authority at the not-for-profit. In other words, no approvals are required if the public servant, for example, merely works with the client population served by the not-for-profit, even if the public servant's agency provides funds to that not-for-profit, unless the public servant has contact with the not-for-profit as part of his or her City duties. On the other hand, providing volunteer assistance in submitting grant applications to the federal government for that same not-for-profit would be considered policy-making, and agency head approval would therefore be required.

E. Waivers for Moonlighting and Volunteer Positions

For both full-time and part-time public servants, waivers may be obtained pursuant to Charter § 2604(e). This section provides that a public servant may hold an otherwise prohibited position when the public servant obtains the written approval of the public servant's agency head *and* the Board then determines, in writing, that the position would not conflict with the purposes and interests of the City. The Board prefers that the agency head approval be more than *pro forma* and that, in all but the most routine cases, the agency head explain why he or she believes no conflict exists.

In determining whether to grant a waiver, the Board considers, among other things, the hours and compensation involved and whether there is any possible relationship between the public servant's official duties and his or her outside activities.

Teaching waivers are particularly common. Many public servants hold adjunct or part-time teaching positions with colleges and universities located in New York City. Many private universities, such as Fordham University and St. John's University, have some kind of business dealings with the City. Most public servants who are doing such teaching in the City will, therefore, require a waiver. However, in Advisory Opinion Number 99-6, the Board determined that public servants teaching at CUNY or SUNY colleges do not require waivers because these government institutions are not "firms," as defined in Charter § 2601(11). Public servants with teaching positions at CUNY or SUNY are still subject to the other restrictions of the conflicts of

interest law, most notably, the prohibitions on using City time or City resources (such as a City computer or e-mail account) for their outside employment.

In Advisory Opinion Number 98-7, the Board determined that a waiver was required for a public servant who, as sole proprietor, is a consultant with an ongoing relationship to his customer firms and therefore has a position with those firms. Based on the written approval of the public servant's agency head, a waiver was granted.

Upon obtaining the waiver, the public servant may accept the position with the firm, but is still bound by the confidentiality restriction and the restrictions on use of City time or City resources, as well as by any additional restrictions set forth in the waiver letter. The Board usually requires that the public servant not be involved, directly or indirectly, in City matters on behalf of the private employer. This includes, but is not limited to, not participating in discussions at the private employer in matters involving the City, not attending meetings with City officials and others on behalf of the private employer, and not receiving copies of relevant documents. This is generally a "two-way" recusal, meaning that the public servant would be subject to the same restrictions in his or her City role in dealing with the private employer as he or she would be in her private position in dealing with matters involving the City.

F. Orders Allowing Ownership Interests

Charter §§ 2604(a)(3) and 2604(a)(4) set forth the procedure for obtaining an "order" from the Board allowing a public servant to hold an otherwise prohibited ownership interest.

Charter § 2604(a)(3) requires public servants holding or acquiring prohibited ownership interests either to divest themselves of the ownership interests or to disclose the interests to the Board and comply with the Board's order. In Advisory Opinion Number 98-3, the Board determined that reporting an ownership interest on annual financial disclosure reports filed with the Board does *not* satisfy the disclosure requirement.

If the public servant discloses his or her ownership interest to the Board, then, pursuant to Charter § 2604(a)(4), the Board shall issue an order setting forth its determination as to whether the interest, if maintained, would conflict with the proper discharge of the public servant's official duties. Section 2604(a)(4) sets forth the following factors for the Board to consider in making its determination: the nature of the public servant's official duties; the manner in which the interest may be affected by any action of the City; and the appearance of conflict to the public. In addition to the foregoing factors, the Board takes into account the financial burden on the public servant caused by the Board's decision.

A decision by the Board permitting the retention of an otherwise prohibited ownership interest is, as noted above, issued in the form of an "order," which, like the Board's advisory opinions, is a document available to the public. In the case of those orders that the Board determines may be of greater public interest, the Board issues these as a "combined" order and advisory opinion, since advisory opinions are more widely distributed.

In Advisory Opinion Number 94-13 and Order Number 45, a prospective public servant was permitted to enter City service notwithstanding her husband's ownership interest—attributed to the prospective public servant by Charter § 2601(16)—in a firm that did business with the City, though not with her City agency. The Board also approved ownership interests in Advisory Opinion Number 97-3, where the spouse's firm had operated for several years before seeking City business, and Advisory Opinion Number 98-2, where the public servants were marketing their product to their own agency.

In Advisory Opinion Number 94-11 and Order Number 44, a recently appointed public servant was permitted to retain his ownership interests in real property because, among other reasons, his official City duties did not concern the kind of property he owned. In Advisory Opinion Number 92-35, a public servant was allowed to retain an ownership interest in a partnership that owned apartments and received housing assistance payments from the City because the public servant had no ability to obtain an advantage for the partnership in its business dealings with the City or procure tenants more easily or on more favorable terms than other owners of rental property.

In issuing an order pursuant to § 2604(a)(4), the Board may require "such other action as it deems appropriate which may mitigate" a conflict. The Board frequently attaches such conditions to its orders, most often requiring the public servant to recuse himself or herself from acting on matters involving the private firm's business dealings with the City.

In Advisory Opinion Number 92-5, prospective part-time commissioners were permitted to enter City service and retain ownership interests in firms that had business dealings with their commission, but recusal was required. Recusal, as defined in Opinion Number 92-5, means not voting on or participating in any matters that involve the private firm's business dealings with the commission. This includes agency discussions, meetings with City officials, and receiving copies of relevant documents. Similarly, in Advisory Opinion Number 95-12, a public servant was allowed to retain his ownership interest in buildings located in districts subject to the regulatory authority of his City agency, provided that he disclosed these interests to his City agency and recused himself from any matters involving these buildings that might, in the future, come before his agency.

The Board, in Advisory Opinion Number 95-21, also allowed public servants to retain their spouses' ownership interests (which were attributed to the public servants) in firms that did business with the City, provided, among other things, that these firms did not seek any new City business and that the public servants had no official contact with these firms. In contrast, in Advisory Opinion Number 95-10, the Board determined that, while a public servant could retain his imputed ownership interest in his spouse's newly formed company, if the company sought to engage in business dealings with the City, the public servant could not remain an employee of the City. The Board found that the close proximity of time between the company's incorporation and its pursuit of City business would create an appearance that the company was formed to take advantage of the public servant's position with the City.

In Advisory Opinion Number 95-29, New York City Human Resources Administration employees were permitted to rent apartments they owned to recipients of public assistance, under certain conditions. Similarly, in Advisory Opinion Number 98-13, employees of the New York City

Department of Housing Preservation and Development were permitted to rent apartments they owned to recipients of federal Section 8 funds, again under certain specified conditions.

G. Special Situations

1. Temporary Employment

In Advisory Opinion Number 98-5, the Board discussed the issue of temporary employment. A public servant may register with and work for temporary agencies, provided that the agencies do not engage in business dealings with the City. Moreover, whenever a public servant works during any twelve-month period for more than 30 days for any individual firm that is a client of the temporary agency, whether or not the 30 days are consecutive, the public servant is deemed to have a "position" with that client firm. Thus, before working for more than 30 days within a twelve-month period for the firm, the public servant must determine whether the firm is engaged in business dealings with the City and, if so, must either refrain from further work for the firm or obtain a waiver from the Board.

2. Private Practice of Law and Expert Testimony

As provided for in Charter § 2604(b)(7), no public servant may appear as an attorney or as counsel against the interests of the City in any litigation in which the City is a party, or in any action or proceeding in which the City, or any public servant of the City acting in the course of his or her official duties, is a complainant. If a public servant is not a regular, full-time employee, this prohibition is limited to the public servant's own agency. Special rules exist in Charter § 2604(b)(7) for elected officials and their employees acting in an official capacity as attorneys. In 2001, the Board fined a Board of Education employee $700 for appearing as an attorney on behalf of a private client in litigation in which the New York City Administration for Children's Services was a party.[60] In 2007, a New York City Department of Education ("DOE") teacher was fined $1,000 for appearing as an attorney against the interests of the DOE in a suspension hearing on behalf of two DOE students.[61] In 2014, the Board issued a public warning letter to an Administrative Law Judge ("ALJ") for the Environmental Control Board ("ECB") for representing his landlord before the ECB to contest two sanitation violation fines; the ALJ was compensated by the landlord in the form of reduced rent for taking on certain responsibilities vis-à-vis the apartment building, including dealing with and, if necessary, paying all fines resulting from sanitation violations.[62]

In addition, Charter § 2604(b)(8) prohibits a public servant from giving opinion evidence as a paid expert against the interests of the City in civil litigation brought by or against the City. If a public servant is not a regular, full-time employee, this prohibition is limited to the public servant's own agency.

Six advisory opinions bear on the issue of the private practice of law by City officers and employees. Advisory Opinion Number 91-7 provides that a public servant may engage in the private practice of law, provided that he or she complies with the relevant provisions of Chapter

68, including the requirements that the public servant conduct the practice during off-duty hours; that the public servant not use City office space or equipment for his or her practice; and that the public servant not do private legal work for persons who or firms that have business dealings with the City.

In Advisory Opinion Number 93-23, the Board determined that a public servant who, as part of his official duties, was charged with the enforcement of certain criminal laws could not, in his private law practice, represent defendants who had been charged with criminal offenses in the City. In Advisory Opinion Number 95-17, the Board determined that a public servant who was an aide to a Member of the City Council could not work part-time for a private law firm, where a substantial portion of the firm's business involved the City and the official duties of the public servant involved working in some of the same substantive areas of law in which the firm was active.

In Advisory Opinion Number 2001-3, the Board comprehensively reviewed the restrictions on the outside practice of law, both compensated and uncompensated. While tracking much of Advisory Opinion Number 91-7, the Board also addressed the provision of legal services to superiors or subordinates, finding it prohibited, whether compensated or not. The Board further stated that it is not a violation of Chapter 68 for a public servant to perform otherwise permitted outside legal work without written approval from his or her City agency, whatever Advisory Opinion Number 91-7 might otherwise have suggested. Finally, the Board noted that the use of City time and resources for outside *pro bono* legal work might be permissible, if the approval set forth in Board Rules § 1-13(c) was obtained.

In Advisory Opinion Number 2008-5, the Board returned to the question of private practice of criminal law and determined that a full-time City employee may not do any compensated criminal defense work in state courts within the City's five boroughs. In addition, a full-time City employee may not accept fees for referring a criminal case pending in any of those courts.

In Advisory Opinion Number 2011-1, the Board considered whether, and if so when, members of City boards and commissions, typically part-time public servants, would be required to recuse themselves from matters at their City agencies involving clients of the private law firms where they were partners. Noting first that the Board had determined in Advisory Opinion Number 94-24 that it would violate Charter § 2604(b)(6) for the public servant's law firm to be involved in any matter before his or her own City agency, the Board in Opinion Number 2011-1 turned to the case where the client, although represented by the public servant's firm on *other* matters, was not represented by the firm in the matter before the public servant's City agency. The Board observed as an initial question that, if the matter before the City agency were of such significance to the client that its outcome would have a material impact on the business *of the law firm*, for example, a matter that might determine whether the client could remain in business, the public servant's recusal would be required, because of the potential impact on his or her firm. In the absence of such a substantial matter, however, the public servant's recusal would still be required if it were determined that he or she was "associated" with the client within the meaning of the conflicts of interest law.[63] The Board determined that the public servant would be deemed

to be so associated with, and therefore required to recuse himself or herself from matters at the City board or commission involving, any client of the firm in whose representation the public servant was currently participating or expected to participate in the future *and* any client that accounts for 5% or more of the firm's total annual billings or is among the firm's top ten clients in revenues.

3. Representing Private Interests before the City: Architects, Engineers, Electricians, Plumbers, Planners, and Others

The Board receives many requests for opinions from public servants who are architects, engineers, electricians, plumbers, and others whose work would involve representing private interests before the City. Their outside work typically is subject to the inspection and approval of the New York City Department of Buildings ("DOB") and, on occasion, other City agencies.

In Advisory Opinion Number 92-36, the Board determined that public servants who are also electricians may file applications with the DOB for certificates of electrical inspection and attend inspections of electrical work covered by these applications. These activities are permissible because they are ministerial in nature. However, anything beyond these types of activities, such as appealing violations, would require discretion on the part of the DOB employees and would be prohibited, absent a waiver from the Board.

In Advisory Opinion Number 95-6, the Board determined that architects and engineers who were City employees could affix their professional seals to architectural plans and, either personally or through an expediter, file the plans with the City, since such appearances would be ministerial. Any greater involvement would constitute a prohibited appearance, though these public servants were advised that they could use expediters to take their plans through the approval process. Thus, the Board in 2014 issued a public warning letter to a Chief Engineer for the New York City Department of Parks and Recreation who communicated with the DOB in his capacity as a private engineering consultant to advise that DOB Construction Code determinations and appeals thereof are not routine and require DOB to exercise substantial discretion and, therefore, invoke the prohibitions of Charter § 2604(b)(6).[64] For City employees who moonlight as plumbers, the Board adopted the reasoning of Board of Ethics Opinion No. 664 and determined certain filings for smaller jobs to be permissible "ministerial" appearances before the DOB, but found filings for larger jobs to be impermissible. In 2002 the Board fined a NYCHA employee $800 for seventeen of these prohibited filings in connection with his outside plumbing business.[65]

A special rule exists for City Planning Commissioners, who are high-level public servants with Citywide policy discretion. These Commissioners cannot, in connection with their private professional practices, appear before the City Planning Commission or before any other City agency on matters that could, in the future, require the involvement or approval of the City Planning Commission.[66] They may, however, be involved in ministerial matters, including the filing of plans with the Department of Buildings. In addition, in Advisory Opinion Number 93-32, a member of the City Planning Commission was advised that his private firm could be listed as a qualified contractor for possible City contracts, provided that he and his firm acted in strict

accordance with the City Planning Commission rule and other relevant provisions of Chapter 68. Most recently, in Advisory Opinion Number 2007-3, the Board incorporated several unpublished opinions concerning the outside activities of the part-time Planning Commissioners into a formal opinion. The Opinion first reviews and discusses the relationship between the conflicts of interest provisions in Charter Chapter 8 ("City Planning"), especially the provisions of Charter § 192(b), and those in Chapter 68, and concludes that the Board has the authority to interpret and, where appropriate, to waive restrictions of both chapters. The Opinion goes on to examine the application of these provisions to certain activities and interests of Planning Commissioners, including the case of a commissioner who works for a large institution that owns real property that may be the subject of an application to the Commission and the case of a commissioner who works for a quasi-public entity and whose work for that entity requires regular communication and coordination with the staff of the Department of City Planning. In each case, the Board determined, pursuant to its waiver authority in Charter § 2604(e), that the commissioner's private employment will not, with certain conditions, conflict with the purposes and interest of the City and will therefore be permissible.

The Board has also addressed other appearances before City agencies. In Advisory Opinion Number 94-24, the Board determined that a high-level public servant's law firm could not appear before the public servant's agency, except with respect to cases where the firm's withdrawal would cause a hardship for the clients. In addition, a public servant who was a City Council Member was advised, in Advisory Opinion Number 94-28, that he could not assist a real estate developer with whom he had a financial relationship by contacting City agencies, elected officials, and others on the developer's behalf. In Advisory Opinion Number 95-15, the Board determined that a public servant could not work part-time for a business improvement district because such work would have required her to make frequent and substantive appearances before other City agencies.[67]

4. Independent Contracting and Other Freelance Work

The Board frequently receives requests for opinions concerning other kinds of part-time work, including work as an independent contractor or freelancer. Such work, if performed on the public servant's own time, without the use of City resources, will generally not violate Chapter 68. If, however, a freelancer has an "ongoing relationship" with a client firm that itself has business dealings with the City, then a Board waiver will be necessary.[68] *See* Section E, above. Absent a waiver, a public servant who moonlights with such a client firm is subject to a Board enforcement action for violating the Charter. Public servants may not use their City position to obtain clients for their private business. The Board and the New York City Department of Education ("DOE") fined a school guidance counselor a total of $6,000 for finding paying clients for his private consulting services among parents of students attending the school at which he worked as a DOE employee. [69]

5. City-Related Outside Employment

In recognition of the City's budget limitations and reduced resources, the Board has issued several opinions allowing public servants to be compensated by private or non-City

entities for work done in furtherance of the City's interests. The Board issues these opinions on a case-by-case basis after consideration of all the relevant facts and circumstances.

In Advisory Opinion Number 95-16, a New York City Police Department ("NYPD") employee was allowed to accept compensation from the police union for his work assisting the NYPD in calculating retirement benefits for other NYPD employees. In Advisory Opinion Number 95-19, employees of the City's Department of Mental Health, Mental Retardation and Alcoholism Services were allowed to accept private Family Court appointments to conduct custody and visitation evaluations for which the Department could no longer afford to pay, with certain restrictions.

In Advisory Opinion Number 95-26, the Board determined that, when a City employee performs part-time services for another City agency, or additional part-time work for his or her own agency, beyond his or her regular City duties, the specific factual situation determines whether the employee needs a waiver from the Board. For example, the Board ruled that no waivers were required to permit City employees from one agency to administer and rate examinations for candidates for City positions at another City agency and for other City employees to teach a certification course at a City training institute administered by their own agency. Generally, this part-time work would be considered dual employment with the City rather than "business dealings with the City." The Board addresses these kinds of situations on a case-by-case basis and requires that the City employee obtain the approval of the City agencies involved.

The factors the Board outlined in Advisory Opinion Number 95-26 to determine whether a position is in the nature of a second City job or an independent contractor include: the extent to which the City controls and finances the program in which the employee would work part-time; whether the City employee negotiates for the second City position as part of an ongoing commercial enterprise; whether the employee's part-time work would be subject to the City agency's control; the degree to which the employee would have autonomy to determine the manner in which the part-time work would be performed; whether the City or the employee provides work space, materials, and equipment for the part-time work; and whether the employee is paid on an hourly basis or on a per-job basis.

6. Working for a Firm that is a City Subcontractor

In Advisory Opinion Number 99-2, the Board determined that a public servant may work part-time for a firm that subcontracts to perform City business, where the Board determined that the subcontractor itself is not engaged in business dealings with the City. The Board will look to several factors to determine whether the subcontractor is engaged in business dealings with the City. Those factors include: whether the subcontractor receives any payment directly from the City; whether the subcontractor reports to the City on any matters; and whether the subcontractor's work on the City contracts is being done at a City site or off-site. If these factors lead to a conclusion that the subcontractor is in fact engaged in business dealings with the City, then a full-time City employee may not moonlight at the firm, absent a waiver from the Board, even if the employee's work for that firm has nothing to do with its City subcontract. The Board

fined a New York City Department of Probation probation officer $750 for owning and operating a private security firm that contracted with private construction firms to provide security guard services at New York City School Construction Authority ("SCA") work sites, pursuant to those firms' contracts with the SCA.[70]

7. Paid Positions with Not-for-Profits

The Board also receives requests concerning paid positions with not-for-profit organizations that have business dealings with the City. When a public servant has a paid position with a not-for-profit, he or she is no longer volunteering for the not-for-profit. As such, the provisions contained in Charter § 2604(c)(6) would not apply to the work performed by the public servant on behalf of the not-for-profit, since the public servant would be considered to have a second or part-time job and to be subject to the rules applicable to moonlighting. The moonlighting provisions are discussed above.

The Board has, however, considered an unusual situation involving the New York City Department of Parks and Recreation ("Parks"). In Advisory Opinion Number 92-34, the Board determined, pursuant to Charter § 2604(e), that several Parks employees could work as paid consultants to a not-for-profit organization whose primary function was to provide financial assistance to the City in support of its parks system. The Board granted the waivers based on the fact that the primary purpose of the organization was to provide such assistance, the proposed consulting work was in furtherance of that purpose and not to secure any private advantage, and the Parks Commissioner, in her approval letter, expressly determined that the consulting work by the employees was in the interest of the City.

8. Fundraising on Behalf of Not-for-Profit Organizations

Fundraising for charitable or not-for-profit organizations is generally permissible, provided that, consistent with the rules regarding any other personal activities, the public servant does this on his or her own time, without the use of City resources, and does not use his or her official position to assist the fundraising efforts.[71] Public servants may therefore raise money for their alma mater, their place of worship, their block association, or other favorite charities. The prohibition against using one's City position to assist such fundraising bars a City employee from seeking contributions to his or her favorite charity from persons or firms with whom the employee deals in his or her City job and from soliciting such funds from his or her City subordinates. The Board fined a Deputy Chief Engineer at the New York City Department of Transportation ("DOT") $1,000 for asking several DOT contractors to place advertisements in a fundraising journal for his sons' hockey club.[72] Similarly, the Board, in a joint disposition with the New York City Department of Education, fined a principal, who also served as the president of a not-for-profit, $2,250 for approaching his subordinates to personally ask each of them to attend a fundraising dinner of the not-for-profit and by sending invitations to fundraising events of the not-for-profit to his subordinates at their homes or in their mailboxes at the school.[73]

In contrast with these rules governing fundraising for a public servant's own personal charities, the Board has issued a number of opinions over the years about fundraising, typically by elected and high-level appointed public servants, for entities with which the official has no personal

affiliation. The beneficiaries of this "non-personal" fundraising include such entities as the City itself, not-for-profit organizations closely affiliated with the City, and other not-for-profit organizations.

In Advisory Opinion Number 2003-4, a comprehensive opinion that reviewed not only the Board's prior opinions concerning gifts to the City but also examined precedents from other jurisdictions, the Board determined that, subject to certain safeguards, elected officials, and indeed all public servants, could solicit gifts *to the City and to those not-for-profits organizations closely affiliated with City agencies and offices* that had been "pre-cleared" by the Board. The safeguards imposed on such "fundraising for the City" are the following: (1) a City official may not engage in the direct, targeted solicitation of any prospective donor who the official knows or should know has a specific matter either currently pending or about to be pending before the City official or his or her agency and where it is within the legal authority or duties of the soliciting official to make, affect, or direct the outcome of the matter; (2) all solicitations must make clear that the donor will receive no special access to City officials or preferential treatment as a result of a donation; and (3) each City agency or office must twice a year file a public report with the Board setting forth certain information concerning the gifts received by the agency during the reporting period, including the identity of the donor and the nature and approximate value of the gift received. For other beneficiaries, that is, not-for-profits that had not been determined by the Board to be closely affiliated with the City, the Board stated that the fundraising question would, at least initially, be addressed on a case-by-case basis.

In Advisory Opinion Number 2008-6, the Board considered the question left unanswered in Opinion Number 2003-4, namely, whether, in the absence of a disqualifying personal "association," City elected officials or agency heads might, in their official capacities and using City time and resources, solicit private contributions for not-for-profit organizations *not* affiliated with the City. The Board determined that, where elected officials or agency heads personally determined that the work of a particular not-for-profit organization supported the work of their office or agency, such official fundraising would be permissible, provided that these solicitations include a statement that a decision whether or not to give will not result in official favor or disfavor and are not targeted at any person or firm with a matter pending or about to be pending before the solicitor's City office or agency. Further, on the same twice-yearly reporting cycle provided for in Opinion Number 2003-4, City officials and agency heads are required to report to the Board the identities of the organizations for which they solicited funding or other private support.

9. Teaching and Writing

There is a special rule for those public servants who seek to teach courses and write books or articles for compensation, whether the entity for which they seek to teach or write engages in business dealings with the City or not.

In Advisory Opinion Number 99-4, the Board determined that it would be a violation of Chapter 68 for an agency head to teach a course for compensation about the workings of his agency and in particular about recent new initiatives at the agency. The first factor to be

considered in making determinations regarding teaching for private compensation is whether the public servant could reasonably have been assigned to teach that course as part of his or her official duties. Under this test, a public servant who wishes to teach a course for compensation about new initiatives at his or her agency may not do so where he or she could reasonably have been assigned to teach that course as part of his or her official duties. Other factors the Board will look to are: (1) in teaching the course, the public servant does not divulge any confidential City information; (2) the public servant does not utilize City time, resources, personnel, or equipment for the teaching or the preparation of any materials to be used for the course; (3) the public servant does not use his or her position as a public servant to obtain a disproportionate rate of pay for teaching a course or to obtain compensation except from the City for performing his or her official duties; and (4) the public servant does not use his or her official title or position in any marketing of the course, although such information may be listed as part of biographical information about the public servant.

In Advisory Opinion Number 99-5, a companion to Opinion Number 99-4, the Board used a similar test to determine that it would be a violation of Chapter 68 for a public servant to write a book for compensation the subject matter of which is related to his official duties where this writing is something he might reasonably have been assigned to perform as part of his City job.

10. Outside Work for or with One's Superior or Subordinate

The Charter prohibits superior and subordinate public servants from entering into a business or financial relationship with each other.[74] This means, for example, that a City employee and his or her subordinate may not become partners in a business; that one may not work for the other in an outside business; and that one may not borrow money from the other. The Board fined a City employee $2,800 for preparing, for compensation, the income tax returns of several of his subordinates.[75] Conversely, the Board fined a City employee $1,250 for preparing the tax returns of her superior for four years, for which the superior paid her approximately $250 per year.[76] In its comprehensive opinion on the outside practice of law, Advisory Opinion Number 2001-3, the Board stated that it would violate the Charter for a public servant to provide legal services to his or her superior or subordinate, whether compensated or uncompensated. The Board fined a Deputy Chief Administrative Law Judge ("ALJ") at the Parking Violations Bureau for the New York City Department of Finance $1,450 for accepting from his subordinate ALJ in the Parking Violations Bureau free legal representation in connection with his divorce. The subordinate ALJ was fined $750.[77]

The prohibition, while serving, among other purposes, to protect subordinates from coercion from superiors, will thus in the appropriate case result in penalties for the subordinate as well as the superior. In 2006, the Board fined both a supervising mechanic *and* his subordinate mechanic ($750 for the former and $460 for the latter) for engaging in a prohibited superior-subordinate financial relationship. The subordinate sold a vintage Corvette to his superior for $14,000 and also performed a brake repair, for $400, on another car owned by the superior.[78]

In 2007, the Board fined a former supervisor of roofers at the New York City Department of Education $2,000 for recommending three of his subordinate roofers for private roofing work and then accepting commissions for his referrals.[79] In 2008, the Board fined a former Captain of the New York City Police Department ("NYPD") $5,000 for using six subordinates to perform work on his private residence. The former NYPD Captain acknowledged that, from in or around 2002 through 2003, he asked six NYPD subordinates to perform remodeling and landscaping work around his home and compensated some of those subordinates for their work. In setting the amount of the fine, the Board took into consideration that the former NYPD Captain forfeited terminal leave valued at approximately $37,000 as a result of departmental charges pending against him at the time of his retirement, which charges arose, in part, out of the same facts recited above.[80]

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[1] *COIB v. Camarata*, COIB Case No. 1999-121 (2001).
[2] *COIB v. J. Romeo*, COIB Case No. 2012-808 (2013).
[3] Advisory Opinion Nos. 2009-3, 2009-4, and 2009-6, respectively.
[4] Charter § 2604(b)(2).
[5] *See* Rules of the Conflicts of Interest Board ("Board Rules"), Vol. 12, Title 53, RULES OF THE CITY OF NEW YORK § 1-13.
[6] *COIB v. Thomas*, COIB Case No. 2003-127 (2005).
[7] *COIB v. Powe*ry, COIB Case No. 2004-466 (2005); *see also COIB v. Andersson*, COIB Case No. 2001-618 (2004) (fining Department of Records and Information Services ("DORIS") Commissioner $1,000 for using DORIS records to conduct genealogy research for clients of his private company).
[8] *COIB v. Turner*, COIB Case No. 1999-200 (2000); *COIB v. Hoover*, COIB Case No. 1999-200 (2000).
[9] *COIB v. Russo*, COIB Case No. 2001-494 (2007).
[10] *COIB v. Tarazona*, COIB Case No. 2006-064 (2007).
[11] *COIB v. Bryk*, COIB Case No. 2008-760 (2008).
[12] *COIB v. Lim*, COIB Case No. 2012-364 (2012).
[13] *COIB v. Fischetti*, COIB Case No. 2010-035 (2010).
[14] *COIB v. D. Reyes*, COIB Case No. 2012-365 (2013).
[15] Advisory Opinion Number 2012-1, footnote 2, at page 13.
[16] Charter § 2604(b)(3).
[17] *COIB v. Campbell*, COIB Case No. 2003-569 (2004).
[18] *COIB v. Portes*, COIB Case No. 2011-337 (2012).
[19] Charter § 2604(b)(4).
[20] *COIB v. An. Williams*, COIB Case No. 2011-663 (2011).
[21] *COIB v. Baksh*, COIB Case No. 2012-021 (2012).
[22] Charter § 2604(b)(6).
[23] Charter § 2601(15).
[24] *COIB v. Marchuk*, COIB Case No. 2005-031 (2007).
[25] *COIB v. Qureshi*, COIB Case No. 2008-760 (2009).

[26] *COIB v. Olsen*, COIB Case No. 2011-189 (2011).
[27] *COIB v. Burgos*, COIB Case No. 2006-380 (2007).
[28] *COIB v. Stark*, COIB Case No. 2011-480 (2012).
[29] Advisory Opinion Number 2012-1.
[30] Charter § 2604(b)(1)(c).
[31] Charter § 2604(b)(1)(a); *see also* Advisory Opinion Number 2009-2.
[32] Charter § 2601(20).
[33] Board Rules §§ 1-06(a) and (b).
[34] Charter §§ 2601(12), 2604(a)(1)(b), 2604(a)(6).
[35] Charter § 2601(18).
[36] *COIB v. Gwiazdzinski*, COIB Case No. 2003-373k (2008); *COIB v. Lee*, COIB Case No. 2003-373a (2008).
[37] *COIB v. McFadzean*, COIB Case No. 2008-941 (2009).
[38] Charter § 2601(11).
[39] Charter § 2601(8).
[40] Charter § 2601(15).
[41] Charter § 2604(a)(6).
[42] *COIB v. Begel*, COIB Case No. 1996-40 (1996).
[43] *COIB v. Steinhandler*, COIB Case No. 2000-231 (2001); *COIB v. Sender*, COIB Case No. 2001-566b (2008).
[44] Charter § 2604(a)(1)(a).
[45] *COIB v. Ricciardi*, COIB Case No. 2008-648 (2010).
[46] Charter § 2604(a)(6).
[47] Charter § 2601(11).
[48] Charter § 2601(8).
[49] Charter § 2601(16), as amended by Board Rules § 1-11.
[50] Charter § 2601(16) and Board Rules § 1-05 ("Definition of Blind Trust").
[51] *COIB v. Goyol*, COIB Case No. 2004-159 (2006).
[52] *COIB v. Bourbeau*, COIB Case No. 2007-442 (2008).
[53] Board Rules § 1-04.
[54] Charter § 2604(a)(2).
[55] Charter § 2604(a)(1)(a).
[56] Charter §§ 2604(a)(1)(a) and 2604(b)(1)(b).
[57] *COIB v. L. Jones*, COIB Case No. 2008-602 (2010).
[58] *COIB v. Harmon*, COIB Case No. 2007-774 (2008).
[59] *COIB v. Antonetty*, COIB Case No. 2013-462 (2013).
[60] *COIB v. Hill-Grier*, COIB Case No. 2000-581 (2001).
[61] *COIB v. Davis*, COIB Case No. 2005-178 (2007).
[62] *COIB v. McAuliffe*, COIB Case No. 2012-532 (2013). In deciding to issue a public warning letter in *McAuliffe* instead of imposing a fine, the Board took into consideration that, prior to appearing before ECB, the Administrative Law Judge had a conversation with an ECB superior that may have led him to believe that he was permitted to make such appearances before ECB.

The Board took the opportunity of the warning letter to remind public servants that the advice of superiors does not absolve public servants from liability under the conflicts of interest law.

[63] Charter § 2601(5).

[64] *COIB v. Natoli*, COIB Case No. 2013-795 (2014).

[65] *COIB v. Loughran*, COIB Case No. 2000-407 (2002).

[66] Board Rules § 1-09

[67] *See also* Advisory Opinion Number 99-5.

[68] *See* Advisory Opinion Number 98-7.

[69] *COIB v. Fleishman*, COIB Case No. 2002-528 (2004).

[70] *COIB v. Saigbovo*, COIB Case No. 2007-058 (2008).

[71] *See* Charter §§ 2604(b)(2) and (b)(3).

[72] *COIB v. King*, COIB Case No. 1998-508 (2001).

[73] *COIB v. Philemy*, COIB Case No. 2007-237 (2008).

[74] Charter § 2604(b)(14).

[75] *COIB v. Guttman*, COIB Case No. 2004-214 (2005).

[76] *COIB v. Ennis*, COIB Case No. 2010-276a (2011).

[77] *COIB v. Keeney*, COIB Case No. 2007-565 (2009); *COIB v. Horowitz*, COIB Case No. 2007-565a (2009).

[78] *COIB v. Marchesi*, COIB Case No. 2005-271 (2006); *COIB v. Parlante*, COIB Case No.2005-271a (2006).

[79] *COIB v. Della Monica*, COIB Case No. 2004-697 (2007).

[80] *COIB v. Byrne*, COIB Case No. 2005-243 (2008).