

# CITY OF NEW YORK CONFLICTS OF INTEREST BOARD

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## **Water Board Political Fundraising**

Charter Sections: 2601(2), 2601(9), 2601(19), 2604(b)(12), 2607

Board Rules: 1-02(a)

### **Advisory Opinion No. 2009-6**

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The Conflicts of Interest Board (the “Board”) received an inquiry from a member of the New York City Water Board, asking whether she might in her private capacity solicit contributions to certain political action committees (“PACs”). This inquiry required the Board first to determine whether members of the Water Board are subject to the restrictions of Charter Chapter 68, the City’s conflicts of interest law. Having determined that Water Board members are subject to Chapter 68, the Board then addressed the application of Charter Section 2604(b)(12), which prohibits certain political fundraising by high-ranking appointed officials, to fundraising for PACs. Because these are important questions not previously decided by the Board, which may be presented in the future, the Board issues this public opinion to set forth its determinations.

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**I. Background**

**A. The New York City Water Board**

The New York City Water Board was established as a public benefit corporation in 1984 pursuant to the New York City Municipal Water Finance Authority Act. See Chapter 513, Laws of 1984. The Water Board consists of seven members, all appointed by the Mayor. Water Board members receive per diem compensation of \$150, up to a maximum of \$5,000 per year. See Public Authorities Law Section 1045-f(3). The Water Board is charged with establishing and collecting fees for the use of the City's water supply and sewage facilities. Such fees must be sufficient to cover the costs of operating and maintaining these water and sewage facilities and the cost of the outstanding obligations issued by the Water Board's sister agency, the Water Finance Authority. In addition, the Water Board has the authority to promulgate rules regarding the collection of fees and regarding the termination of water and sewage services.

**B. The Member's Proposed Activity**

The Water Board member is, in her private capacity, an executive officer of a non-partisan policy-making organization (the "Organization") that advocates for a particular cause and that supports candidates for elected office who it believes will be supporters of that cause. The Organization accomplishes its goals in part by fundraising for its political action committees ("PACs"). The majority of the money raised by the PACs goes to support candidates for federal, state, and local office outside the City; however, some fraction goes to candidates for City elective office, and may also go to support the candidacies of current City elected officials who are seeking non-City elective office. In her position with the Organization, the member is responsible for overseeing fundraising efforts for the PACs, and in some cases she makes the

actual requests for donations. All decisions regarding distribution of funds from the PACs to support particular candidates are made by the Organization's board of directors, on which the Water Board member does not serve.

## **II. Relevant Law**

The City's conflicts of interest law, contained in Charter Chapter 68, applies, with the exception of Section 2607 (Gifts by Lobbyists), to conflicts of interest and other conduct of **public servants**. Charter Section 2601(19) defines public servants as "all officials, officers and employees of the city, including members of community boards and members of advisory committees, except unpaid members of advisory committees shall not be public servants."

Charter Section 2601(9) defines "the city" as "the city of New York and includes an agency of the city." And Charter Section 2601(2) defines a City "agency" as follows:

"Agency" means a city, county, borough or other office, position, administration, department, division, bureau, board, commission, authority, corporation, advisory committee or other agency of government, the expenses of which are paid in whole or in part from the city treasury, and shall include but not be limited to, the council, the offices of each elected official, the board of education, community school boards, community boards, the financial services corporation, the health and hospitals corporation, the public development corporation, and the New York city housing authority, but shall not include any court or any corporation or institution maintaining or operating a public library, museum, botanical garden, arboretum, tomb, memorial building, aquarium, zoological garden or similar facility.

Charter Section 2604(b)(12) provides that:

No public servant, other than an elected official, who is a deputy mayor, or head of an agency or who is charged with substantial policy discretion as defined by rule of the board, shall directly or indirectly request any person to make or pay any political assessment, subscription or contribution for any candidate for an elective office of the city or for any elected official who is a candidate for any

elective office; provided that nothing contained in this paragraph shall be construed to prohibit such public servant from speaking on behalf of any such candidate or elected official at an occasion where a request for political assessment, subscription or contribution may be made by others.

Board Rules Section 1-02(a) states that, for purposes of Charter Section 2604(b)(12), a public servant will be deemed to have substantial policy discretion if

[H]e or she has major responsibilities and exercises independent judgment in connection with determining important agency matters. Public servants with substantial policy discretion include, but are not limited to: agency heads, deputy agency heads, assistant agency heads, **members of boards** and commissions, and public servants in charge of any major office, division, bureau or unit of an agency.

(Emphasis added).

### **III. Discussion**

#### **A. Are Water Board Members Subject to Chapter 68?**

As noted above, the threshold question presented is whether the members of the Water Board are subject to Charter Chapter 68.

In making its determination, the Board first considered Opinion No. 11-90 of the New York City Law Department, which the Board has historically consulted when addressing questions of the applicability of Chapter 68 to various entities. In that Opinion, the Law Department noted that the Water Board does not appear to fall under the definition of a City “agency” set forth in Charter Section 2601(2) because the Water Board does not receive funding from the City Treasury, all of its expenses instead being funded by the fees it imposes and collects. See Opinion No. 11-90 at 60. Nevertheless, the Opinion continued, a specific provision of the 1984 Water Board enabling legislation, codified as Section 1045-f(6) of the Public

Authorities Law, provides that “[m]embers of the water board, other than members holding other public office or employment, may engage in private employment, or in a profession or business, *subject to the limitations contained in sections twenty-six hundred four, twenty-six hundred five, twenty-six hundred six and twenty-six hundred seven of the New York city charter*” – *i.e.*, subject to all the provisions of Chapter 68 as it existed in 1984 (emphasis added). Based on this provision, Opinion No. 11-90 concluded that the Legislature intended to make Water Board members subject to Chapter 68. *Id.* at 60-61.

The Board agrees with the conclusion of the Law Department that the Legislature intended for the members of the Water Board to fall under Chapter 68. The provision in Section 1045-f(6) expressly subjecting Water Board members to all of the prohibitions then set forth in Chapter 68 evidenced a legislative intent that all the prohibitions of Chapter 68 would apply to the members of the Water Board. In addition, it appears to be sound public policy that members of the City’s Water Board should be subject to the same conflicts of interest law as all other public servants of the City. It would be incongruous for members of such other rate-setting bodies as the Taxi and Limousine Commission and the Rent Guidelines Board to be subject, as they are, to Chapter 68, but for Water Board members to be exempt. The Board accordingly concurs with the Law Department’s conclusion that members of the Water Board are subject to the provisions of Chapter 68.

**B. May Water Board Members Fundraise for PACs?**

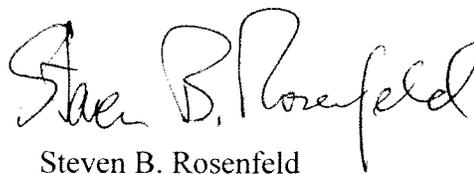
Next, the Board notes that as members of a board or commission, members of the Water Board are plainly public servants charged with substantial policy discretion (*see* Board Rules Section 1-02(a)) and hence are subject to the restrictions on political fundraising set forth in

Charter Section 2604(b)(12). Accordingly, Water Board members may not “directly or indirectly request any person to make or pay any political assessment, subscription or contribution for any candidate for an elective office of the city or for any elected official who is a candidate for any elective office.” The remaining question presented, therefore, is how Section 2604(b)(12) applies to fundraising for PACs that *might* subsequently contribute to the campaigns of such candidates. On the one hand, when the Water Board member, in her private capacity, solicits contributions to the PACs, she is not raising money for any particular candidate for elective office, and there is no assurance that any of the funds she raises will go to support either candidates for City elective office or current City elected officials running for non-City offices. On the other hand, based on the PACs’ past history, there is a likelihood that at least a portion of the money she raises will indeed go to such candidates.

On balance, it is the Board’s view that since Charter Section 2604(b)(12) states that City public servants charged with substantial policy discretion may not “**directly or indirectly** request any person to make or pay any political...contribution,” it should be interpreted broadly. Indeed, if Section 2604(b)(12) were construed to permit fundraising for PACs, which in turn could then pass contributions on to candidates for whom the public servant could not raise funds directly, the “directly or indirectly” prohibition would be rendered a nullity. The Board accordingly concluded, and so advised the Water Board member, that she may not make any solicitation, or supervise others in making solicitations, for any PAC whose funds might go to support a candidate for City office or a current City elected official who is a candidate for any elective office.

**IV. Conclusion**

The members of the New York City Water Board are subject to Charter Chapter 68, the City's conflicts of interest law. The members of the Water Board are "public servants charged with substantial policy discretion" and hence are subject to the restrictions of Charter Section 2604(b)(12), which prohibits such public servants from soliciting funds for certain candidates for elected office. That provision not only prohibits solicitation of contributions that will go directly to a proscribed candidate, but also prohibits solicitations of contributions to PACs whose funds may go to support a proscribed candidate.



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Dated: December 3, 2009