

**New York City Conflicts of Interest Board
Proposed Amendments to Chapter 68 of the New York City Charter**

**Conflicts of Interest
Chapter 68
of the
New York City Charter**

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§ 2600. Preamble. Public service is a public trust. These prohibitions on the conduct of public servants are enacted to preserve the trust placed in the public servants of the city, to promote public confidence in government, to protect the integrity of government decision-making and to enhance government efficiency. **City agencies may adopt additional conflicts of interest standards for their employees; such additional standards may prohibit conduct or interests permitted by this chapter but may not permit conduct or interests prohibited by this chapter.**

Commentary: This amendment would make explicit that Chapter 68 is not intended to prevent agencies from adopting conflicts of interest rules that are stricter than those contained in Chapter 68. For example, some agencies may prohibit their employees from accepting gifts of any size from individuals or firms doing business with the agency. While, as is the case under current Chapter 68, the Board will not interpret or enforce agency rules, the Board alone, subject to judicial review, will continue to determine what is and is not permitted by Chapter 68 and thus whether an agency rule is in conflict with Chapter 68. See Charter §§ 2603(c), (e)-(h). Note also that the proposed addition of Charter §2605(b) would subject private individuals and entities to the jurisdiction of the Board for inducing a public servant to violate this Chapter.

§ 2601. **Definitions.** As used in this chapter,

1. “Advisory committee” means a committee, council, board or similar entity constituted to provide advice or recommendations to the city and having no authority to take a final action on behalf of the city or take any action which would have the effect of conditioning, limiting or requiring any final action by any other agency, or to take any action which is authorized by law.

2. “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, **the board of elections, the office of the public administrator, the campaign finance board,** community ~~[school boards]~~ **education councils,** community boards, the ~~[financial services]~~ **economic development** corporation, **the industrial development agency,** the health and hospitals corporation, the ~~[public]~~ **housing** 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.

Commentary: This amendment replaces community school boards, the Financial Services Corporation, and the Public Development Corporation, which no longer exist, with their successors. The Financial Services Corporation and the Public Development Corporation have been merged into the Economic Development Corporation, which administers the Industrial Development Agency. In 1990, the Law Department, in Opinion No. 11-90, pp. 34-48 and 64, concluded that the PDC, FSC, and IDA are not subject to Chapter 68 as a matter of law, despite the express inclusion of the PDC and FSC in current § 2601(2). Nonetheless, the Board believes that these agencies perform, in effect, City functions and should be regarded as City agencies and subject to Chapter 68. Indeed, the contract between the EDC and the City contains conflicts of interest provisions and subjects EDC employees to Chapter 68, as a matter of contract; and by state law the IDA is subject to the City’s financial disclosure requirements set forth in Ad. Code § 12-110 (see N.Y. Gen. Mun. Law §§ 810(1) and (3)). Moreover, the Public Authorities Accountability Act of 2005, 2005 N.Y. Laws ch. 766, amended Pub. Auth. Law §§ 2 and 2825 to subject the EDC and the IDA to the City’s financial disclosure law, set forth in N.Y.C. Ad. Code § 12-110. Bringing the IDA

within Chapter 68 would presumably remove it from the coverage of the State conflicts of interest law for municipal officers and employees set forth in article 18 of the General Municipal Law (see N.Y. Gen. Mun. Law § 800(4)), if article 18 currently applies.

The amendment also adds the Board of Elections, the office of the Public Administrator, and the Campaign Finance Board. Each of these agencies is, it is widely agreed, presently subject to Chapter 68 since their expenses are paid in whole or in part from the City treasury, making them City agencies within the meaning of current Charter § 2601(2). See also Law Dept. Op. No. 11-90, p. 32 (Board of Elections). However, inclusion of these agencies will clarify for the public that they are subject to Chapter 68. The amendment also adds the Housing Development Corporation, which State law expressly makes subject to Chapter 68. See Priv. Housing Fin. Law § 653(2). Note that, even after this amendment, Charter § 2601(2) will remain an illustrative, not an exhaustive, list of "agencies."

3. "Agency served by a public servant" means (a) in the case of a paid public servant, the agency employing such public servant or (b) in the case of an unpaid public servant, the agency employing the official who has appointed such unpaid public servant unless the body to which the unpaid public servant has been appointed does not report to, or is not under the control of, the official or the agency of the official that has appointed the unpaid public servant, in which case the agency served by the unpaid public servant is the body to which the unpaid public servant has been appointed.

4. "Appear" means to make any communication, for compensation, other than those involving ministerial matters.

5. A person or firm "associated" with a public servant includes a spouse, domestic partner, child, **grandchild**, parent, **grandparent** or sibling; **a parent, child, or sibling of the public servant's spouse or domestic partner; [a] and each** person with whom, **or each firm with which**, the public servant has a **present or potential** business or other financial relationship, **including, without limitation, an ownership interest of any value in a firm or a position with a firm** [~~firm in which the public servant has a present or potential interest~~]. **A child, grandchild, parent, grandparent and sibling shall include a step-child, step-grandchild, step-parent, step-grandparent and step-sibling.**

Commentary: The definition of "associated" ties into Charter § 2604(b)(3), which, among other things, prohibits a public servant from taking an action

that would benefit a person associated with the public servant. But the definition of “associated” in current Chapter 68 is significantly narrower than in many ethics codes. For example, under current Chapter 68 taking an action to benefit one’s grandparent, grandchild, or family member of one’s spouse or domestic partner would not result in a violation of § 2604(b)(3), absent some financial relationship between the public servant and the person benefitted. (Benefitting the spouse of one’s sibling would typically benefit the sibling and thus, under current law, violate § 2604(b)(3).) By contrast, the New York State’s ethics law defines “relative” as “any person living in the same household as the individual and any person who is a direct descendant of that individual’s grandparents or the spouse of such descendant.” Pub. Off. Law § 73(1)(m). See also Pub. Off. Law §§ 73(14), (15) (prohibiting participation in personnel actions involving a relative, in contracting decisions involving payment to a relative or an entity in which a relative has a financial interest, or in a decision to invest public funds in securities of an entity in which the relative has a financial interest or is an underwriter or receives any brokerage, origination, or servicing fees). The State law would thus also apply to aunts, uncles, cousins, nieces, and nephews, while the proposed amendment extends Chapter 68 only to include grandchildren, grandchildren, and in-laws.

A potential interest would include, for example, an investment in a firm that one has substantively discussed but not yet made. Thus, since one is associated with such a firm, taking an action as a public servant to award a contract to that firm would benefit the firm, in violation of § 2604(b)(3).

The other changes in the subdivision (5) do not alter, but merely make explicit, current law.

6. "Blind trust" means a trust in which a public servant, or the public servant's spouse, domestic partner, or unemancipated child, has a beneficial interest, the holdings and sources of income of which the public servant, the public servant's spouse, domestic partner, and unemancipated child have no knowledge, and which meets requirements established by rules of the board, which shall include provisions regarding the independent authority and discretion of the trustee, and the trustee's confidential treatment of information regarding the holdings and sources of income of the trust.

7. "Board" means the conflicts of interest board established by this chapter.

8. "Business dealings with the city" means any transaction with the city involving the sale, purchase, 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 shall not include any transaction involving a public servant's residence or any ministerial matter.

9. "City" means the city of New York and includes an agency of the city.

10. **“Domestic partner” means persons who have a registered domestic partnership pursuant to section 3-240 of the administrative code, as amended, or any successor statute, and the rules and regulations promulgated thereunder, a domestic partnership registered in accordance with executive order number 123, dated August 7, 1989, as amended, or any successor executive order, or a domestic partnership registered in accordance with executive order number 48, dated January 7, 1993, as amended, or any successor executive order.**

Commentary: Current Chapter 68 includes the definition of “domestic partner” within the subdivision defining “spouse” (Charter § 2601(21)(b)). This amendment merely shifts the definition here.

11. "Elected official" means a person holding office as mayor, comptroller, public advocate, **district attorney**, borough president or member of the council.

Commentary: Under current Chapter 68, the district attorneys' offices are agencies of the City and their employees are thus subject to Chapter 68, as are the district attorneys themselves. However, the failure to include the district attorneys within the definition of “elected official” results in their being treated differently from the other elected officials. For example, currently, elected officials are prohibited from bidding on City-owned real property (§ 2604(c)(7)), from having an ownership interest in firms doing business with any agency of their branch of City government even if the stock is publicly traded (§§ 2604(a)(1),(a)(5)(a)), and from appearing before any agency of their entire branch of City government for one year after leaving City service (a branch-wide ban that also applies to the Corporation Counsel and the Commissioner of Investigation, among others) (§ 2604(d)(3)). (Other restrictions and exemptions targeted at elected officials are either changed by these amendments or irrelevant to district attorneys, such as exemptions from restrictions on political fundraising and on holding political party positions. See Charter §§ 2604(b)(12), (b)(15).) No

principled reason appears to exist for treating district attorneys differently from other elected officials for purposes of Chapter 68.

12. “Elective office of the city” means an office held by an elected official.

Commentary: In the past some confusion has arisen over the definition of elective office of the City, as used in § 2604(b)(12). See, e.g., Advisory Opinion No. 2003-1. The addition of this definition would eliminate that confusion.

[~~11~~] **13.** "Firm" means sole proprietorship, joint venture, partnership, corporation and 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.

[~~12. "Interest" means an ownership interest in a firm or a position with a firm.~~]

Commentary: Defining “interest” to include not only an ownership interest but also a position in a firm has consistently confused public servants. To add to the confusion, sometimes in the current Chapter 68 “interest” is used not as a term of art (as defined in current § 2601(12)) but as a generic term. See, e.g., current §§ 2601(5), 2604(b)(1), (b)(2), (b)(4). Therefore, these amendments eliminate the definition of “interest” and replace the word “interest” with “ownership interest in a firm or position with a firm.”

1314. "Law" means state and local law, this charter, and rules issued pursuant thereto.

1415. "Member" means a member of the board.

[~~15~~] **16.** "Ministerial matter" means an administrative act, including the issuance of a license, permit or other permission by the city, which is carried out in a prescribed manner and which does not involve substantial personal discretion.

[~~16~~] **17.** "Ownership interest" means an interest in a firm held by a public servant, or the public servant's spouse, domestic partner, or unemancipated child, which exceeds five percent of the firm or an investment of twenty-five thousand dollars in cash or other form of commitment, whichever is less, or five percent or

twenty-five thousand dollars 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 any such firm, but shall not include interests held in any pension plan, deferred compensation plan or mutual fund, the investments of which are not controlled by the public servant, the public servant's spouse, domestic partner, or unemancipated child, or in any blind trust which holds or acquires an ownership interest. The amount of twenty-five thousand dollars specified herein shall be modified by the board pursuant to subdivision a of section twenty-six hundred three.

[17] **18.** "Particular matter" means any case, proceeding, application, request for a ruling or benefit, determination, contract limited to the duration of the contract as specified therein, investigation, charge, accusation, arrest, or other similar action which involves a specific party or parties, including actions leading up to the particular matter; provided that a particular matter shall not be construed to include the proposal, consideration, or enactment of local laws or resolutions by the council, or any action on the budget or **on the** text of the zoning resolution.

[18] **19.** "Position" means a position in a firm, such as an officer, director, trustee, employee, or any management position, or as an attorney, agent, broker, or consultant to the firm, which does not constitute an ownership interest in the firm.

[19] **20.** "Public servant" means all officials, officers and employees of the city, including members of community boards and members of advisory committees, except **that** unpaid members of advisory committees shall not be public servants.

[20] **21.** "Regular employee" means 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.

22. "Represent" means to act as a representative, attorney, agent or consultant on behalf of any person or entity.

Commentary: Public servants and even agency counsel have from time to time expressed confusion over the meaning of "represent," as used in current § 2604(b)(6) (proposed § 2604(b)(7)), making the addition of a definition advisable.

[~~21. a.~~] 23. "Spouse" means a husband or wife of a public servant who is not legally separated from such public servant.

[~~b. "Domestic partner" means persons who have a registered domestic partnership pursuant to section 3-240 of the administrative code, a domestic partnership registered in accordance with executive order number 123, dated August 7, 1989, or a domestic partnership registered in accordance with executive order number 48, dated January 7, 1993.~~]

Commentary: The definition of "domestic partner" was shifted, unchanged, with the exception of the cross-reference updates, to a new § 2601(10).

[~~22~~] 24. "Supervisory official" means any person having the authority to control or direct the work of a public servant.

[~~23~~] 25. "Unemancipated child" means any son, daughter, step-son or step-daughter who is under the age of eighteen, unmarried and living in the household of the public servant.

26. "Valuable gift" means a valuable gift as defined by rule of the board.

Commentary: As a general proposition, ethics laws should, where feasible, avoid the inclusion of definitions within substantive provisions. See Davies, Enacting a Local Ethics Law – Part I: Code of Ethics, NYSBA/MLRC MUNICIPAL LAWYER, vol. 21, no. 3, at 4 (Summer 2007). In any event, the proposed amendments to the gift provision in Charter § 2604(b)(5) necessitate, for the sake of clarity, transfer of the definition from that provision to a separate subdivision.

§ 2602. Conflicts of interest board.

a. There shall be a conflicts of interest board, **which shall be an independent agency**, consisting of five members,. **The members shall be appointed by the mayor with the advice and consent of the council. The mayor shall designate a chair. No more than one member of the board may be a non-resident of the city of New York, provided that such non-resident member has at the time of appointment previously demonstrated expertise in ethics.**

Commentary: While the Mayor and the Council have historically respected the Board's independence, that independence, including budgetary

independence (see subdivision (i) below), should be made explicit in the Charter. Authorizing one member of the Board to be a non-resident of the City would better enable the appointment of a Board member who has significant experience in the field of ethics.

b. Members shall be chosen for their independence, integrity, civic commitment and high ethical standards. No person while a member shall hold any public office, seek election to any public office, be a public employee in any jurisdiction, hold any political party office, or appear **[as a lobbyist] directly** before the city, **except on his or her own behalf or on behalf of his or her own business or employer.**

Commentary: Board members should not be permitted to appear in a representative capacity before any City agency, as virtually every agency has matters pending before the Board at one time or another. Board members should be able to appear on their own behalf or on behalf of their business or employer before an agency other than the COIB (appearances before the COIB are prohibited by § 2604(b)(6)), for example, before the Tax Commission seeking a reduction in the assessment on their home; to provide otherwise would appear unfair and may severely prejudice Board members who work for smaller firms or who are sole practitioners. So, too, Board members should be able to work “behind the scenes” on a client’s matter pending before an agency other than the COIB, provided that someone else in their firm appears in a representative capacity before that agency, as such appearances would be considered only “indirect” appearances by the COIB Board member (even indirect appearances by the Board member before the COIB are prohibited by § 2604(b)(6)).

c. Each member shall serve for a term of six years; provided, however, that of the three members first appointed, one shall be appointed for a term to expire on March thirty-first, nineteen hundred ninety, one shall be appointed for a term to expire on March thirty-first, nineteen hundred ninety-two and one shall be appointed for a term to expire on March thirty-first, nineteen hundred ninety-four, and of the remaining members, one shall be appointed for a term to expire on March thirty-first, nineteen hundred ninety-two and one shall be appointed for a term to expire on March thirty-first, nineteen hundred ninety-four. If the mayor has not submitted to the council a nomination for appointment of a successor at least sixty days prior to the expiration of the term of the member whose term is expiring, the term of the member in office shall be extended for an additional year and the term of the successor to such member shall be shortened by an equal amount of

time. If the council fails to act within forty-five days of receipt of such nomination from the mayor, the nomination shall be deemed to be confirmed. No member shall serve for more than two consecutive six-year terms. ~~[The three initial nominations by the mayor shall be made by the first day of February, nineteen hundred eighty-nine and both later nominations by the mayor shall be made by the first day of March, nineteen hundred ninety.]~~

Commentary: This transitional provision is no longer necessary. The proviso in the first sentence of the subdivision cannot be deleted because it establishes and maintains the staggered terms of Board members.

d. Members shall receive a per diem compensation, no less than the highest amount paid to an official appointed to a board or commission with the advice and consent of the council and compensated on a per diem basis, for each calendar day when performing the work of the board, **and may be reimbursed for expenses reasonably incurred in the performance of their duties.**

Commentary: This amendment merely clarifies and codifies current practice. The language is taken from Charter § 626 (Board of Correction).

e. Members of the board shall serve until their successors have been confirmed. Any vacancy occurring other than by expiration of a term shall be filled by nomination by the mayor made to the council within sixty days of the creation of the vacancy, for the unexpired portion of the term of the member succeeded. If the council fails to act within forty-five days of receipt of such nomination from the mayor, the nomination shall be deemed to be confirmed.

f. Members may be removed by the mayor for substantial neglect of duty, gross misconduct in office, inability to discharge the powers or duties of office or violation of this section, after written notice and opportunity for a reply.

g. The board shall appoint ~~[a counsel]~~ **an executive director** to serve at its pleasure and shall employ or retain such other officers, employees and consultants as are necessary to exercise its powers and fulfill its obligations. The authority of the ~~[counsel]~~ **executive director** shall be defined in writing, provided that neither the ~~[counsel]~~ **executive director**, nor any other officer, employee or consultant of the board shall be authorized to issue advisory **letters and** opinions, promulgate rules, issue subpoenas, issue final determinations of violations of this chapter, or make final recommendations of or impose penalties. The board may delegate its authority to issue advisory **letters and** opinions to the chair.

Commentary: The term "counsel" was carried over to the Conflicts Board from its predecessor, the Board of Ethics. Two reasons support the replacement of "counsel" with "executive director." First, the amendment reflects that the size and mission of the Conflicts of Interest Board are larger than those of the Board of Ethics. Second, it gives the Board the freedom to hire a qualified non-lawyer for the position of executive director. In regard to the addition of "letters," see Commentary to § 2603(c).

h. The board shall meet at least once a month and at such other times as the chair may deem necessary. Two members of the board shall constitute a quorum and all acts of the board shall be by the affirmative vote of at least two members of the board.

§ 2603. Powers and obligations.

a. Rules. The board shall promulgate rules as are necessary to implement and interpret the provisions of this chapter, consistent with the goal of providing clear guidance regarding prohibited conduct. The board, by rule, shall once every four years adjust the dollar amount established in subdivision sixteen of section twenty-six hundred one of this chapter to reflect changes in the consumer price index for the metropolitan New York-New Jersey region published by the United States bureau of labor statistics.

b. Training and education.

1. The board shall have the responsibility of informing public servants and assisting their understanding of the conflicts of interest provisions of this chapter. In fulfilling this responsibility, the board shall develop educational materials regarding the conflicts of interest provisions and related interpretive rules and shall develop and administer an on-going program for the education of public servants regarding the provisions of this chapter.

2. (a) The board shall make information concerning this chapter available and known to all public servants. On or before the tenth day after an individual becomes a public servant, such public servant shall be provided with a copy of this chapter and shall sign a written statement, which shall be maintained in his or her personnel file, that such public servant has received and read and shall conform with the provisions of this chapter.

(b) Each public servant shall undergo training provided by the board in the provisions of this chapter on or before the sixtieth day after he or she becomes a public servant, and periodically as appropriate during the course of his or her city service. Every two years, each agency shall develop and implement an appropriate agency training plan in consultation with the board and the mayor's office of operations. Each agency shall cooperate with the board in order to ensure that all public servants in the agency receive the training required by this subdivision and shall maintain records documenting such training and the dates thereof. The training required by this subdivision may be in person, provided either by the board itself or by agency personnel working in conjunction with the board, or through an automated or online training program developed by the board.

(c) The failure of a public servant to receive the training required by this paragraph, to receive a copy of this chapter, or to sign the statement required by this paragraph, or the failure of the agency to maintain the required statement on file or record of training completed, shall have no effect on the duty of such public servant to comply with this chapter or on the enforcement of the provisions thereof.

Commentary: This subdivision reflects the amendments to Chapter 68 adopted by the voters at the general election on November 2, 2010.

c. Advisory letters and opinions.

1. The board shall render **confidential advisory letters and public advisory opinions** with respect to all matters covered by this chapter. An advisory **letter or opinion** shall be rendered on the request of a public servant or a supervisory official of a public servant **or on the request of any person subject to the provisions of subdivision b of section twenty-six hundred five of this chapter or of section twenty-six hundred seven** and shall apply only to such public servant **or other person**. The request shall be in such form as the board may require and shall be signed by the person making the request. The **[opinion] advisory letters and opinions** of the board shall be based on such facts as are presented in the request or subsequently submitted in a written, signed document.

Commentary: Formal advisory opinions provide guidance to public servants as to the meaning of Chapter 68. In most instances, however, legal advice by the COIB addresses either settled issues or one-of-a-kind cases in which an advisory opinion would be of little use to other public servants in interpreting Chapter 68. Thus, since its inception, the COIB has rendered advice not only by public advisory opinions (which, pursuant to §

2603(c)(3), must delete any information that might identify the requester) but also by formal confidential written advice by staff attorneys (so-called staff letters) and advice by the Board in the form of confidential letters from the Board (so-called Board letters). The amendments to this subdivision merely reflect this practice. (Note that the Board also grants waivers pursuant to § 2604(e), which are public.)

Any person subject to Chapter 68, whether or not a public servant, should be permitted to request an advisory opinion from the Board as to whether the person's proposed conduct may violate Chapter 68. Therefore, reference to persons subject to Charter §§ 2605(b) or 2607 must be added.

2. Advisory **letters and** opinions shall be issued only with respect to proposed future conduct or action by a public servant **or other person subject to the provisions of this chapter**. A public servant **or other person** whose conduct or action is the subject of an advisory **letter or** opinion shall not be subject to penalties or sanctions by virtue of acting or failing to act due to a reasonable reliance on the opinion, unless material facts were omitted or misstated in the request for an opinion. The board may amend a previously issued advisory **letter or** opinion after giving reasonable notice to the public servant **or other person** that it is reconsidering its opinion; provided that such amended advisory **letter or** opinion shall apply only to future conduct or action of the public servant **or other person**.

Commentary: See Commentary to § 2603(c)(1).

3. The board shall, **in its public advisory opinions**, make [~~public its advisory opinions with~~] such deletions as may be necessary to prevent disclosure of the identity of any public servant or other involved party. The **public** advisory opinions of the board shall be indexed by subject matter and cross-indexed by charter section and rule number and such index shall be maintained on an annual and cumulative basis.

Commentary: See Commentary to § 2603(c)(1).

4. [~~Not later than the first day of September, nineteen hundred ninety the board shall initiate a rulemaking to adopt, as interpretive of the provisions of this chapter,~~] **The board may adopt** any advisory opinions of the board of ethics constituted pursuant to chapter sixty-eight of the charter heretofore in effect, which the board determines to be consistent with and to have interpretive value in construing the provisions of this chapter.

Commentary: While the Board regularly consults decisions of its predecessor, the Board of Ethics, it has never possessed the resources to pass upon the currency of all 688 opinions of that agency; and indeed such a requirement makes little sense, especially in view of the large body of interpretative decisions now available from the COIB itself. In addition, Board of Ethics decisions are not readily available, and are completely unavailable in searchable form, although COIB is working to make Board of Ethics opinions accessible on the Board's website.

5. For the purposes of this subdivision, public servant includes a prospective and former public servant, and a supervisory official includes a supervisory official who shall supervise a prospective public servant and a supervisory official who supervised a former public servant.

d. Financial disclosure.

1. All financial disclosure statements required to be completed and filed by public servants pursuant to state or local law shall be filed by such public servants with the board.

2. The board shall cause each statement filed with it to be examined to determine if there has been compliance with the applicable law concerning financial disclosure and to determine if there has been compliance with or violations of the provisions of this chapter.

3. The board shall issue rules concerning the filing of financial disclosure statements for the purpose of ensuring compliance by the city and all public servants with the applicable provisions of financial disclosure law.

e. Complaints.

1. The board shall receive complaints alleging violations of this chapter.

2. Whenever a written complaint is received by the board, it shall:

(a) dismiss the complaint if it determines that no further action is required by the board; or

(b) refer the complaint to the commissioner of investigation if further investigation is required for the board to determine what action is appropriate; or

(c) make an initial determination that there is probable cause to believe that a ~~[public servant]~~ **person** has violated a provision of this chapter; or

(d) refer an alleged violation of this chapter to the head of the agency served by the public servant, if the board deems the violation to be minor or if related disciplinary charges are pending against the public servant, **in which event the agency shall consult with the board before issuing a final decision;**
or

Commentary: The amendment makes the language of section 2603(e)(2)(d) consistent with that of section 2603(h)(2) and clarifies that, whenever the Board refers a matter to another City agency, the agency must consult with the Board before imposing discipline.

(e) refer the complaint to a law enforcement agency.

Commentary: See Commentary to § 2603(k).

3. For the purposes of this subdivision, a public servant includes a former public servant.

f. Investigations.

1. The board shall have the power to direct the department of investigation to conduct an investigation of any matter related to the board's responsibilities under this chapter. The commissioner of investigation shall, within a reasonable time, investigate any such matter and submit a confidential written report of factual findings to the board.

2. The commissioner of investigation shall make a confidential report to the board concerning the results of all investigations which involve or may involve violations of the provisions of this chapter, whether or not such investigations were made at the request of the board.

g. Referral of matters within the board's jurisdiction.

1. A public servant or supervisory official of such public servant may request the board to review and make a determination regarding a past or ongoing action of such public servant. Such request shall be reviewed and acted upon by the board in the same manner as a complaint received by the board under subdivision e of this section.

2. Whenever an agency receives a complaint alleging a violation of this chapter or determines that a violation of this chapter may have occurred, it shall, **upon receipt of such complaint or determination**, refer such matter to the board. Such referral shall be reviewed and acted upon by the board in the same manner as a complaint received by the board under subdivision e of this section.

Commentary: This amendment clarifies that an agency must refer the matter to the Board when the agency receives the complaint or determines that a possible violation of Chapter 68 has occurred, not after the agency has concluded a disciplinary proceeding, if any.

3. For the purposes of this subdivision, public servant includes a former public servant, and a supervisory official includes a supervisory official who supervised a former public servant.

h. Hearings.

1. If the board makes an initial determination, based on a complaint, investigation or other information available to the board, that there is probable cause to believe that ~~[the public servant]~~ **any person** has violated a provision of this chapter, the board shall notify ~~[the public servant]~~ **such person** of its determination in ~~[writing]~~ **a confidential written communication**. The notice shall contain a statement of the facts upon which the board relied for its determination of probable cause and a statement of the provisions of law allegedly violated. The board shall also inform the ~~[public servant]~~ **person, who shall be deemed the respondent**, of the board's procedural rules. ~~[Such public servant]~~ **The respondent** shall have a reasonable time to respond, **which time shall be set forth in the board's procedural rules**, either orally **to the board's staff** or in writing **to the board**, and shall have the right to be represented by counsel or any other person.

Commentary: "Public servant" is changed to "any person" or "respondent"

to reflect the Board's jurisdiction over non-public servants who violate the proposed new § 2605(b) or current § 2607. In addition, the amendments make explicit the confidential nature of the probable cause notice, a matter implicit in current §§ 2603(h)(4) and (k). The amendments would also expressly require the Board to adopt rules establishing deadlines for responding to Board notices. See Board Rules, 53 RCNY § 2-01(a). Following receipt of a written submission by a respondent, the Board, in its discretion, may receive an oral presentation by the respondent. The Board, however, will rarely hear an oral presentation in response to a probable cause notice.

2. If, after receipt of the **[public servant's] respondent's response or the failure of the respondent to respond within the time permitted by rule of the board**, the board determines that there is no probable cause to believe that a violation has occurred, the board shall dismiss the matter and inform the **[public servant] respondent [in writing]** of its decision **in a confidential written communication**. If, after the consideration of the response by the **[public servant] respondent**, the board determines there remains probable cause to believe that a violation of the provisions of this chapter has occurred, the board **shall so notify the respondent in a confidential written communication and** shall hold or direct a hearing to be held on the record to determine whether such violation has occurred, or shall, **in a confidential written communication**, refer the matter to the appropriate agency if the **respondent is a public servant [is]** subject to the jurisdiction of any state law or collective bargaining agreement which provides for the conduct of disciplinary proceedings~~[, provided that when]~~. **When** such a matter is referred to an agency, the agency **may initiate its own disciplinary proceedings against the respondent or it may decline to initiate such proceedings. The agency shall promptly notify the board in writing of its decision and, should disciplinary proceedings be commenced,** shall consult with the board before issuing a final decision. **Notwithstanding this referral to the agency, the board retains jurisdiction over its proceeding against the public servant and may proceed with enforcement whether or not the agency elects to pursue its own disciplinary proceedings against the public servant.**

Commentary: As noted above, "public servant" must be changed to "respondent" to reflect the Board's jurisdiction over non-public servants who violate the proposed new § 2605(b) and current § 2607). So, too, as in paragraph (1), the amendments make explicit the confidential nature of the Board's notices of dismissal, notices sustaining probable cause, and referrals to agencies, a matter implicit in current §§ 2603(h)(4) and (k). The addition of the language addressing the failure of the public servant to respond to the

notice of probable cause makes explicit that the Board may act even where the public servant fails to respond. To avoid the problems that arise when an agency fails to notify the Board that the agency has or has not commenced disciplinary proceedings against a respondent, the amendments would mandate such notice to the Board. The last sentence of the proposed paragraph would reiterate the authority already given to the Board under current § 2603(h)(6) to proceed against a public servant after the Board has referred the matter to the public servant's agency for consideration of disciplinary action.

3. If the board determines, after a hearing or the opportunity for a hearing, that a public servant has violated provisions of this chapter, it shall, after consultation with the head of the agency served or formerly served by the public servant, or in the case of an agency head, with the mayor, issue an order either imposing such penalties provided for by this chapter as it deems appropriate, or recommending such penalties to the head of the agency served or formerly served by the public servant, or in the case of an agency head, to the mayor; provided, however, that the board shall not impose penalties against members of the council, or public servants employed by the council or by members of the council, but may **publicly** recommend to the council such penalties as ~~[it]~~ **the board** deems appropriate. **If the board determines, after a hearing or the opportunity for a hearing, that a respondent who is not a public servant has violated provisions of this chapter, it shall issue an order imposing such penalties provided for by this chapter as the board deems appropriate. [The] An order determining that a violation occurred** shall include findings of fact and conclusions of law **and shall be public.** When a penalty is recommended **by the board,** the head of the agency **or the mayor, in the case of an agency head,** or the council shall **publicly** report to the board what action was taken.

Commentary: The consultation requirement “recognizes that agencies have a strong interest in the disciplining of their officers and employees.” Vol. II, Report of the Charter Revision Commission, Dec. 1986 – Nov. 1988, at p. 166. The amendments also make explicit that only Board orders that find a violation of Chapter 68 shall be public, as shall recommendations to the Council upon a finding by the Board that a member or staff member of the Council has violated Chapter 68 and an agency's or the Mayor's or Council's report back to the Board on what action has been taken in response to a Board recommendation for a penalty after the Board has found a violation. Board orders finding no violation are confidential pursuant to § 2603(k). Thus, no change is made in the current law in regard

to the public nature of Board enforcement proceedings: only an order finding that a violation has occurred, and an agency response to a subsequent recommendation by the Board, shall be public. See current § 2603(h)(4), (k). See also Vol. II, Report of the Charter Revision Commission, Dec. 1986 – Nov. 1988, at p. 167.

4. Hearings of the board shall not be public unless requested by the **[public servant] respondent. [The order and the board's findings and conclusions shall be made public.]**

Commentary: These amendments make no change in the current law. “Public servant” is changed to “respondent” to reflect the Board’s jurisdiction over non-public servants who violate the proposed new § 2605(b) or current § 2607. The second sentence of this paragraph has been imported into paragraph (3), where it more properly belongs.

5. The board shall maintain **[an] a public** index of all persons found to be in violation of this chapter, by name, **[office] agency** and date of order. **[The index and the determinations of probable cause and orders in such cases shall be made available for public inspection and copying.]**

Commentary: These amendments make no change in the current law. Despite the confusing language in current § 2603(h)(5), “determinations of probable cause” have never been public, whether they are initial notices of probable cause under §2603(h)(1) or subsequent petitions reflecting that the Board has sustained such an initial determination under § 2603(h)(2). The Charter Revision Commission Report is silent on why they were included within this paragraph, when hearings and all other enforcement proceedings are confidential except a final order and findings of a violation and proceedings subsequent thereto. Even after such an order finding a violation has been issued, releasing the probable cause notice would make no sense and would in fact contradict the Charter Revision Commission’s clear preference for making public only sustained violations of Chapter 68, as such notices and petitions often contain allegations that in fact proved unfounded. The amendments simply delete this inexplicable reference to such probable cause documents.

6. Nothing contained in this section shall prohibit the appointing officer of a public servant from terminating or otherwise disciplining such public servant, where such appointing officer is otherwise authorized to do so; provided,

however, that such action by the appointing officer shall not preclude the board from exercising its powers and duties under this chapter with respect to the actions of any such public servant. **Nothing contained in this section shall prohibit the board from referring any matter to a law enforcement agency at any time.**

Commentary: See Commentary to § 2603(k).

7. For the purposes of this subdivision, the term public servant shall include a former public servant.

i. Annual report.

The board shall submit an annual report to the mayor and the council in accordance with section eleven hundred and six of this charter. The report shall include a summary of the proceedings and activities of the board, a description of the education and training conducted pursuant to the requirements of this chapter, a statistical summary and evaluation of complaints and referrals received and their disposition, such legislative and administrative recommendations as the board deems appropriate, the rules of the board, and the index of opinions and orders of that year. The report, which shall be made available to the public, shall not contain information, which, if disclosed, would constitute an unwarranted invasion of the privacy of [~~a public servant~~] **any person.**

Commentary: “Public servant” must be changed to “any person” to reflect the Board’s jurisdiction over non-public servants who violate the proposed new § 2605(b) or current 2607.

j. Revision.

The board shall review the provisions of this chapter and shall recommend to the council from time to time such changes or additions as it may consider appropriate or desirable. Such review and recommendation shall be made at least once every five years.

k. Confidentiality.

Except as otherwise provided in this chapter, the records, reports, memoranda and files of the board shall be confidential and shall not be subject to public scrutiny.

The board may, but is not required to, release such documents if their confidentiality is waived by the public servant or respondent. Nothing

contained in this section shall prohibit the board from releasing records, reports, memoranda or files of the board to a law enforcement agency, but the board shall not be compelled to do so except pursuant to a judicially endorsed subpoena.

Commentary: The amendment providing for the waiver of confidentiality incorporates the present practice of the Board and clarifies the Board's discretionary authority to release documents or information the confidentiality of which has been waived. The provision for disclosure of board records to a law enforcement agency removes the uncertainty that now exists in this area. The amendments would statutorily reflect the Board's practice to honor only judicially endorsed subpoenas in criminal matters. (The Board has never produced confidential documents for use in civil lawsuits.) Moreover, the amendments would provide that, where the Board refers a complaint to a law enforcement agency, no subpoena would be required for documents thus produced by the Board. See proposed §§ 2603(e)(2)(e) and (h)(6).

§ 2604. Prohibited interests and conduct.

a. Prohibited interests in firms engaged in business dealings with the city.

1. [~~Except as provided in paragraph three below,~~]

Commentary: This introductory phrase appears unnecessary and inconsistent with structure of Chapter 68. For example, the restrictions in § 2604(b) are not prefaced by any reference to the waiver provisions of § 2604(e).

(a) ~~[n]~~**No** public servant shall have an **ownership** interest **or a position** in a firm which such public servant knows is engaged in business dealings with the agency served by such public servant; provided, however, that, subject to paragraph ~~[one]~~ **three** of subdivision b of this section, an appointed member of a community board shall not be prohibited from having an **ownership** interest **or position** in a firm which may be affected by an action on a matter before the community or borough board, and

Commentary: On the replacement of the word “interest” with “ownership interest in a firm or position with a firm,” see Commentary to current §

2601(12) (definition of “interest”). Current § 2604(b)(1) has been moved to § 2604(b)(3), thus requiring a corresponding change in the cross-reference.

(b) [n]No regular employee shall have an **ownership** interest **or position** in a firm which such regular employee knows is engaged in business dealings with the city, except **[if such] for an ownership** interest **[is]** in a firm whose shares are publicly traded, as defined by rule of the board.

Commentary: See Commentary to § 2604(a)(1)(a) on the substitution of “ownership interest or position in a firm” for “interest.” As to the limitation of the publicly traded exception to ownership interests, the Board has never read that exception as applying to a position with a firm but only to an ownership interest in a firm. Indeed, the mechanism (namely, orders) in current § 2604(a)(3) for obtaining permission to maintain an interest otherwise prohibited by § 2604(a) expressly applies only to ownership interests. Permission to maintain a prohibited position in a firm (e.g., to moonlight for a firm doing business with the City) must be obtained by way of a waiver under § 2604(e).

2. Prior to acquiring or accepting an **ownership** 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 of whether such firm is engaged in business dealings with such agency. Such determination shall be in writing, shall be rendered expeditiously and shall be binding on the city and the public servant with respect to the prohibition of subparagraph a of paragraph one of this subdivision.

Commentary: Limiting this paragraph to ownership interests makes no change in the law. See Commentary to § 2604(a)(1)(b).

3. An individual who, prior to becoming a public servant, has an ownership interest which would be prohibited by paragraph one above; or a public servant who has an ownership interest and did not know of a business dealing which would cause the interest to be one prohibited by paragraph one above, but has subsequently gained knowledge of such business dealing; or a public servant who holds an ownership interest which, subsequent to the public servant's acquisition of the interest, enters into a business dealing which would cause the ownership interest to be one prohibited by paragraph one above; or a public servant who, by operation of law, obtains an ownership interest which would be prohibited

by paragraph one above shall, prior to becoming a public servant or, if already a public servant, within ten days of knowing of the business dealing, either:

(a) divest the ownership interest; or

(b) disclose to the board such ownership interest and ~~[comply with its order]~~ seek a waiver, pursuant to subdivision e of section twenty-six hundred four of this chapter, permitting retention of such interest subject to such conditions as the board may direct. In making its determination on the application for a waiver, the board shall determine whether or not the ownership interest, if maintained, would be in conflict with the proper discharge of the public servant's official duties and shall take into account the nature of the public servant's official duties, the manner in which the ownership interest may be affected by any action of the city, the financial burden of the board's decision on the public servant, and the appearance of conflict to the public.

Commentary: No principled reason exists for distinguishing between § 2604(a)(4) orders, which permit an otherwise prohibited ownership interest, and § 2604(e) waivers, which permit an otherwise prohibited position or conduct. The amendment imports into § 2604(a)(3)(b) the factors set forth in current § 2604(a)(4) that the Board must consider in determining whether to permit an otherwise prohibited ownership interest. Thus, apart from replacing “order” with “waiver,” these amendments effect no change in current law.

4. ~~[When an individual or public servant discloses an interest to the board pursuant to paragraph three of this subdivision, the board shall issue an order setting forth its determination as to whether or not such interest, if maintained, would be in conflict with the proper discharge of the public servant's official duties. In making such determination, the board shall take into account 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. If the board determines a conflict exists, the board's order shall require divestiture or such other action as it deems appropriate which may mitigate such a conflict, taking into account the financial burden of any decision on the public servant.~~

Commentary: See Commentary to § 2604(a)(3).

5.] For the purposes of this subdivision, the agency served by

(a) an elected official, other than a member of the council, shall be the executive branch of the city government,

(b) a public servant who is a deputy mayor, the director to the office of management and budget, commissioner of citywide administrative services, corporation counsel, commissioner of finance, commissioner of investigation or chair of the city planning commission, or who serves in the executive branch of city government and is charged with substantial policy discretion involving city-wide policy as determined by the board, shall be the executive branch of the city government,

~~(c) [a public servant designated by a member of the board of estimate to act in the place of such member as a member of the board of estimate, shall include the board of estimate, and~~

Commentary: The Board of Estimate has been abolished.

~~(d)~~ a member of the council shall be the legislative branch of the city government.

[6]5. For the purposes of subdivisions a and b of section twenty-six hundred six, a public servant shall be deemed to know of a business dealing with the city if such public servant should have known of such business dealing with the city.

b. Prohibited conduct.

1. ~~[A public servant who has an interest in a firm which is not prohibited by subdivision a of this section, shall not take any action as a public servant particularly affecting that interest, except that~~

~~(a) in the case of an elected official, such action shall not be prohibited, but the elected official shall disclose the interest to the conflicts of interest board, and on the official records of the council or the board of estimate in the case of matters before those bodies,~~

~~(b) in the case of an appointed community board member, such action shall not be prohibited, but no member may vote on any matter~~

~~before the community or borough board which may result in a personal and direct economic gain to the member or any person with whom the member is associated, and~~

~~(e) in the case of all other public servants, if the interest is less than ten thousand dollars, such action shall not be prohibited, but the public servant shall disclose the interest to the board. No public servant shall pursue personal or private activities during times when the public servant is required to perform services for the city or use city letterhead, personnel, equipment, resources, or supplies for any non-city purpose, except as provided by rule of the board.~~

Commentary: The relationship between § 2604(b)(1) and § 2604(b)(3) has been confusing, at best. Accordingly, current § 2604(b)(1) has been transferred to § 2604(b)(3), with certain changes, as discussed in the Commentary to § 2604(b)(3). A new § 2604(b)(1) has been added, incorporating into Chapter 68 subdivisions (a) and (b) of the Board's so-called "(b)(2) rule," that is, the Board's rule, set forth in 53 RCNY § 1-13 and adopted pursuant to Charter § 2606(d), stating that it shall be a violation of Charter § 2604(b)(2) for a public servant to use City time, letterhead, personnel, equipment, resources, or supplies for any non-City purpose. Misuse of City resources is a significant conflict of interest and should be set forth in Chapter 68 itself. (Adding it as the first paragraph in § 2604(b) serves the important function of preserving the current paragraph numbers in subdivision (b) and thus avoiding the substantial confusion that would result if the citations in the Board's advisory opinions and enforcement dispositions no longer corresponded to the revised Chapter 68.)

2. No public servant shall engage in any **conduct**, business, transaction or private employment, or have any financial or other private interest, direct or indirect, which is in conflict with the proper discharge of his or her official duties.

Commentary: Charter § 2604(b) is entitled and in general addresses prohibited conduct, while § 2604(a) is entitled and addresses prohibited interests. Thus, the "catch-all" provision of § 2604(b)(2) (so-named by the Charter Revision Commission, see Vol. II, Report of the Charter Revision Commission, Dec. 1986 – Nov. 1988, at p. 175) should also address conduct.

3. No public servant shall use or attempt to use his or her position as a public servant 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[-], **except that:**

Commentary: As noted in the Commentary to § 2604(b)(1), the relationship between § 2604(b)(1) and § 2604(b)(3) has been confusing, at best. Accordingly, current § 2604(b)(1) has been transferred to § 2604(b)(3), with certain changes, which are discussed below.

(a) a member of the council shall not be prohibited from voting on a matter before the council that might result in a financial gain, contract, license, privilege or other private or personal advantage, direct or indirect, for the council member or any person or firm associated with the member, provided that the member first discloses, to the conflicts of interest board and on the official records of the council, the matter, the nature of the potential advantage, the identity of any such associated person or firm, and the relation between the matter and such person or firm;

Commentary: Currently, Charter § 2604(b)(1) provides that a public servant “who has an interest in a firm which is not prohibited by [§ 2604(a)]...shall not take an action as a public servant particularly affecting that interest, except that...in the case of an elected official, such action shall not be prohibited, but the elected official shall disclose the interest to the conflicts of interest board, and on the official records of the council...in the case of matters before [the Council].” The proposed amendments, as noted, would shift this exception to § 2604(b)(3) and would limit it to voting by Councilmembers, for the reasons set forth below. First, § 2604(b)(3) is a broader prohibition than that contained in § 2604(b)(1), so a narrowing of the exception is necessarily required. Second, according to the Charter Revision Commission, the purpose of this exception is to permit elected officials to execute “the essential functions they have been elected to perform.” Vol. II, Report of the Charter Revision Commission, Dec. 1986 – Nov. 1988, at p. 174. Thus, the exception in the amendments is limited to the performance of such essential functions. In Advisory Opinion No. 94-28, the Board concluded, under current Charter § 2604(b)(1)(a), that a Councilmember may propose or support local legislation, or support the passage of State legislation, that could benefit an associated person of the Councilmember, provided that the Councilmember makes the required disclosure. More recently, however, in Advisory Opinion No. 2009-2, the

Board concluded that a Councilmember may not sponsor discretionary funding for an entity at which the Member is a paid employee or where the funding may benefit an associated person of the Member, but with disclosure on the official records of the Council and to the Board the Member may vote on a budget containing such an appropriation sponsored by another Member. The distinction between the two opinions turns on whether the activity of the elected official is deemed to be an “essential function,” the term employed in the Report of the Charter Revision Commission. Under the proposed revision, this exception is limited to voting. Voting is permitted, even if it would otherwise violate § 2604(b)(3), because voting is a non-delegable duty of the Councilmember; and recusal from voting would thus disenfranchise the Councilmember’s constituents. If other elected officials have similar non-delegable duties, this proposed exception should be expanded to include them as well. For example, if a Councilmember or Borough President may not delegate to a designee the right to independently vote at a Borough Board meeting, then such votes should also be included in the exception.

Finally, current § 2604(b)(1)(a) does not specify the nature and extent of the required disclosure. The amendments would fill that gap. Disclosure on the records of the Council would include, for example: “This rezoning may increase the value of a lot owned by my law firm partner because that lot is one of the three lots subject to this rezoning.”

Note that under this proposed amendment, as under current § 2604(b)(1), no disclosure is required where the matter affects a broad class of citizens generally, one of whom is the individual Councilmember. For example, a Councilmember may lobby for and vote on, without disclosure, a local law rezoning a multi-block area in which the Councilmember’s home or business is located because taking an action on a matter with wide application does not constitute a violation of § 2604(b)(3), either for the Councilmember or for any other public servant. Cf. Advisory Opinion No. 2001-2 (untargeted political fundraising), 2006-4 (acceptance of widely available government discounts), 2008-6 (untargeted fundraising for not-for-profit entities).

(b) a community board member shall not be prohibited from discussing any matter before the community or borough board, provided that, if the matter may result in a personal and direct economic gain to the member or any person or firm with whom or with which the member is associated, the member shall disclose his or her interest in the matter on the

records of the community or borough board, and further provided that in no case may the member vote on any such matter;

Commentary: The exception for community board members in current § 2604(b)(1)(c) permits a community board member to take an action particularly affecting his or her interest, provided that the community board member does not “vote on any matter before the community or borough board which may result in a personal and direct economic gain to the member or any person with whom the member is associated...” Thus, “[d]iscussing the matter with other members and at meetings is not prohibited.” Vol. II, Report of the Charter Revision Commission, Dec. 1986 – Nov. 1988, at p. 175. In Advisory Opinion No. 91-3, the Board determined that, where a community board member is prohibited from voting, before discussing the matter the member must disclose to the other members of the community board the nature and extent of his or her private interest in the matter.

By shifting the exception to § 2604(b)(3), a broader prohibition than current § 2604(b)(1), the amendments expand upon the current exception. Likewise, they make explicit the Board’s holding in Advisory Opinion No. 91-3. Note that disclosure to the Conflicts of Interest Board is not required under this provision.

(c) if the financial gain, contract, license, privilege or other private or personal advantage involves an ownership interest in a firm and the interest is valued at less than ten thousand dollars, such action shall not be prohibited, but the public servant shall disclose the interest to the board;

Commentary: This amendment merely shifts the exception from current § 2604(b)(1)(c) but makes no change in the law regarding this exception.

(d) where the public servant is associated with a person or firm solely by reason of having earned five hundred dollars or less from that person or firm during the preceding twelve months and/or having purchased from that person or firm goods or services valued at one thousand dollars or less during the preceding twelve months, such action shall not be prohibited; and

Commentary: Currently § 2604(b)(3) contains no exceptions for actions affecting a de minimis association, such as taking an action as a public

servant that may benefit Chase Manhattan Bank when one merely has one's checking and saving account with that bank. This amendment would address two of the most common de minimis associations, where one has earned or received goods or services of a small amount.

(e) a public servant shall not be prohibited from taking such action where the interest of the public servant has been defined as de minimis by rule of the board.

Commentary: Many other de minimis associations exist. While the less obvious ones may need to be spelled out by Board advisory opinions, other, more common ones should be included in a rule of the Board. Possible candidates for such a rule might include, among others, a benefit provided equally to all residents of the City, an interest in a time or demand deposit in a financial institution, the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association, or of a member of a credit union, an endowment or insurance policy or annuity contract purchased from an insurance company, and an extension of credit from a government-regulated financial institution upon terms and conditions generally available to the public and not in excess of some specified amount. See, e.g., Mun. Code of Chicago § 2-156-010(l)(d)-(f); Anne Arundel County (Md.) Code § 7-1-101(15)(ii)-(iii); American Bar Association Model Code of Judicial Conduct, Definition of "Economic Interest"; Calif. Gov't Code § 87103(c). Parsing the advisability and language of these and other such exceptions would seem better left to the administrative/CAPA procedure, rather than the Charter amendment process.

Nothing contained in this paragraph shall permit the holding of an ownership interest or a position prohibited by subdivision a of this section.

Commentary: Current § 2604(b)(1) expressly provides that it applies only where the interest is not prohibited by § 2604(a). This amendment merely shifts that provision to §2604(3).

4. No public servant shall **use for private advantage or** disclose any confidential information [~~concerning the property, affairs or government of the city which~~] **that** is obtained as a result of [~~the official duties of~~] such public servant's **city position** and [~~which~~] **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 of any other person or firm associated with the public servant~~; provided, however, that this shall not prohibit any public servant from disclosing any information concerning conduct which the public servant knows or reasonably believes to involve waste, inefficiency, corruption, criminal activity or conflict of interest.

Commentary: The amendments replace “use any such information to advance any direct or indirect financial or other private interest of the public servant or of any other person or firm associated with the public servant” with “use for private advantage,” since any misuse of confidential information for a private, non-City advantage should be prohibited. Second, the amendments eliminate the requirement that the confidential information concern “the property, affairs or government of the city” because much confidential information in the possession of the City is in fact information, even trade secrets, from and involving solely private entities. Third, the amendments change “obtained as a result of the official duties of such public servant” to “obtained as a result of such public servant’s city position” because whether the official obtained the information in the course of his or her official duties is irrelevant; the issue, from a Chapter 68 (and § 2604(b)(3)) perspective, is whether the public servant obtained the information as a result of the public servant’s City position. Note that under the amendment, as under current law, while use is prohibited only if it is for private advantage, any disclosure, whether or not for private advantage, is prohibited, as mere disclosure alone may result in significant harm to the City, its residents, and those who do business with it.

5. No public servant who is a regular employee shall request any gift or accept any valuable gift~~[, as defined by rule of the board,]~~ from any person or firm which such public servant knows is or intends to become engaged in business dealings with the city~~[,]~~. No public servant who is not a regular employee shall request any gift or accept any valuable gift from any person or firm which such public servant knows is or intends to become engaged in business dealings with the agency served by such public servant. No elected official, deputy mayor, or agency head, except an agency head who is not a regular employee, shall request any gift or accept any valuable gift from any person or firm whether or not such person or firm is or intends to become engaged in business dealings with the city. ~~[except that n]~~ Nothing contained ~~[herein]~~ in this paragraph shall prohibit a public servant from accepting a gift which is customary on family and social occasions.

Commentary: *The amendments make clear that a public servant may never request a gift of any size, even a coffee mug, from anyone doing business with the City (in the case of a part-time public servant, with his or her City agency) because requesting any gift, in those circumstances, represents a clear abuse of office and a misuse of one's City position.*

The "defined by rule of the Board" definition of "valuable gift" is moved to the definitions section, proposed § 2601(27).

As to the distinction between part-time and full-time public servants ("regular employee" is defined in current § 2601(20), proposed § 2601(21)), on its face, current § 2604(b)(5) would prohibit a part-time public servant, even an unpaid member of a City board or commission, from accepting a valuable gift from someone doing business with a completely separate City agency. That approach stands in contrast to other Chapter 68 doing-business provisions, such as §§ 2604(a)(1) (prohibiting part-time public servants from having an ownership interest or position in a firm doing business with their own agency), 2604(b)(6) (prohibiting part-time public servants from representing, for compensation, private interests before their own City agency or from appearing on behalf of private interests in matters involving their own City agency), 2604(b)(7) (prohibiting part-time public servants from appearing as an attorney against the interests of their own City agency in any litigation in which their own City agency is a party or in any action or proceeding to which their own City agency, or a public servant of their own City agency, acting in the course of his or her official duties, is a complainant), and 2604(b)(8) (prohibiting a part-time public servant from giving opinion evidence as a paid expert against the interests of their own City agency in any civil litigation in which their agency is a party). In the case of part-time public servants, the amendments thus limit the prohibition of § 2604(b)(5) to gifts from firms doing business with the part-time public servant's own City agency.

The amendments also would prohibit all gifts to high-level, full-time public servants regardless of whether the donor has any City business. (Such gifts would, of course, be subject to the definitions and exceptions of the Board's valuable gift rule, set forth in 53 RCNY § 1-01.) This proposal initially arose out of the enforcement proceeding against former Police Commissioner Howard Safir for accepting a free trip to the Oscars from a firm having limited business with the Police Department. COIB v. Safir, COIB Case No. 1999-115 (2000). The Board believes that, in the case of such high-level public servants, acceptance of any gift, unless it meets one of the exceptions in the Board's rule, reflects a potential misuse of office, as in such cases the gift likely results from the fact of the recipient's City position.

For example, in Advisory Opinion No. 92-10, the Board, citing § 2604(b)(3), determined that an elected official could not accept the invitation of a firm that had no business dealings with the City to attend an event sponsored by the firm at a resort outside the State, concluding that “in the absence of a governmental purpose, the elected official’s acceptance of this trip may create the appearance that he has received a valuable gift solely because of his official position.” See also Advisory Opinion No. 92-23 (determining that an elected official could not accept two free tickets from a common carrier for travel to a destination outside of the State, even though the donor had no business dealings with the City, where accepting the gift did not promote any governmental purpose); Advisory Opinion No. 94-12 (determining that a high-level public servant could not accept a ceremonial sword presented to him from a restaurant and entertainment center, located outside the City, which had a sales office and information center in Manhattan). The motive for such a gift – whether to “grease the wheels” for possible future City business or merely as a token of respect – can rarely be determined with certainty. In any event, in virtually all such cases, it appears that the public servant would not have obtained the gift but for his or her official position. Accordingly, the Board recommends that such high-level City officials not be allowed to accept valuable gifts from anyone, whether or not the donor does City business, unless the gift falls within one of the exceptions in the Board’s valuable gift rule, including the exception in § 2604(b)(5) itself for family gifts.

6. No public servant, **except in the course of his or her official City duties,** shall [~~for compensation, represent private interests~~] **appear, directly or indirectly,** before any city agency [~~or appear directly or indirectly~~] on behalf of [~~private interests in matters involving the city~~] **any person or entity.** For a public servant who is not a regular employee, this prohibition shall apply only to the agency served by the public servant.

Commentary: While the Board’s jurisprudence on current §§ 2604(b)(6) and (b)(7) is fairly well defined, the relationship between these provisions can present some difficulty to the casual observer. Accordingly, the Board recommends placing direct and indirect appearances before the City under § 2604(b)(6) and representation of others against the interests of the City in litigation, actions, or proceedings under § 2604(b)(7).

In § 2604(b)(6), appearances on behalf of “private interests” is replaced with appearances on behalf of any person or firm “except in the course of...official duties.” In some instances one may in fact properly

appear on behalf of private interests in the course of official duties (Councilmembers often properly do so), and in some instances an appearance in one's non-City capacity on behalf of a non-City public interest may be improper (e.g., a public servant appearing before a City agency on behalf of a State agency for which the public servant is moonlighting). The amendments would cure these problems. So, too, the amendments also delete "for compensation" because "appear" is defined in § 2601(4) to mean only compensated communications.

7. No public servant, **except in the course of his or her official City duties**, shall [~~appear as attorney or counsel~~] **represent any person or firm** against the interests of the city in any litigation, **action or proceeding** to which the city is a party, or in any **litigation**, action or proceeding in which the city, or any public servant of the city, acting in the course of official duties, is a complainant, provided that this paragraph shall not apply to a public servant employed by an elected official who appears as attorney or counsel for that elected official in any litigation, action or proceeding in which the elected official has standing and authority to participate by virtue of his or her capacity as an elected official, including any part of a litigation, action or proceeding prior to or at which standing or authority to participate is determined. This paragraph shall not in any way be construed to expand or limit the standing or authority of any elected official to participate in any litigation, action or proceeding, nor shall it in any way affect the powers and duties of the corporation counsel. For a public servant who is not a regular employee, this prohibition shall apply only to the agency served by the public servant.

***Commentary:** See Commentary to § 2604(b)(6). The amendments also correct the internal inconsistency within this provision as to the use of "litigation, action or proceeding," a phrase that would capture not only court proceedings but also administrative proceedings, grand jury proceedings, arbitrations, mediations, conciliations, other alternative dispute resolution proceedings, legislative proceedings, and the like. Moreover, by using the word "represent," a term newly defined in proposed § 2601(23) to include uncompensated as well as compensated activity, instead of "appear," which is defined in § 2601(4) to require compensation, this provision would now plainly apply to uncompensated appearances on behalf of another person, reflecting the Board's interpretation in Advisory Opinion No. 2001-3 that "appear" as used in current § 2604(b)(7) in fact includes both compensated and uncompensated appearances.*

8. No public servant shall give opinion evidence as a paid expert against the interests of the city in any [~~civil~~] litigation, **action or proceeding** brought by or against the city. For a public servant who is not a regular employee, this prohibition shall apply only to the agency served by the public servant.

Commentary: To make explicit that this rather narrow provision (it affects only paid experts) applies not only to civil judicial proceedings in New York State courts of record but also, for example, to criminal proceedings, such as criminal trials and grand jury proceedings, as well as to administrative proceedings, arbitrations, mediations, conciliations, other alternative dispute resolution proceedings, legislative proceedings, and the like, the amendments delete “civil” and add “action or proceeding.” These changes also make § 2604(b)(8) consistent with § 2604(b)(7).

9. No public servant shall,

(a) coerce or attempt to coerce, by intimidation, threats or otherwise, any public servant to engage in political activities **or participate in a political campaign,** [~~or~~]

Commentary: No reason would seem to exist for using “engage in political activities” in subparagraph (a) and “participate in a political campaign” in subparagraph (b). Requests, intimidation, and coercion as to both kinds of activities should be prohibited.

(b) request any subordinate public servant to participate in a political campaign. [~~For purposes of this subparagraph, participation in a political campaign shall include managing or aiding in the management of a campaign, soliciting votes or canvassing voters for a particular candidate or performing any similar acts which are unrelated to the public servant's duties or responsibilities.~~] Nothing contained herein shall prohibit a public servant from requesting a subordinate public servant to speak on behalf of a candidate, or provide information or perform other similar acts, if such acts are related to matters within the public servant's duties or responsibilities, **or**

Commentary: The inclusion of “participate in a political campaign” in subparagraph (a) requires shifting the definition of “participation in a political campaign” to a new subparagraph (d).

(c) compel, induce or request any person or entity to engage in political activities or participate in a political campaign where the public servant knows or should know that such person or entity has a specific matter either currently pending or about to be pending before the public servant or his or her agency and where it is within the legal authority or duties of the public servant to make, affect, or direct the outcome of the matter.

Commentary: The new subparagraph (c) arises from the Board's view that it is inherently coercive and in conflict with the proper discharge of a public servant's official duties for a public servant even to request a private person or entity to engage in political activities when the public servant has power with respect to that person or entity. See NYS Ethics Comm'n Advisory Opinion No. 98-12 (determining, among other things, that a State executive branch appointed employee "may not solicit funds from any individual or business entity (1) which currently has matters before him or before the units he supervises, (2) which he has substantial reason to believe will have matters before him or such units in the foreseeable future, or (3) which had matters before him or such units in the last twelve months" and that "[i]f an entity properly solicited by him makes a contribution and then has a matter before him or a unit he supervises, he should recuse himself if the matter arises within one year of the contribution, although the length of the period may vary depending upon the circumstances"). See also Municipal Code of Chicago § 2-156-140 (prohibiting a non-elected City employee or official from soliciting or accepting any political contribution from a person doing business or seeking to do business with the city, except for his or her own campaign and then subject to certain restrictions); Rev. Charter of Honolulu § 6-1112.2(a) (prohibiting persons in civil service from soliciting or receiving political contributions from anyone on public assistance); Honolulu Rev. Ordinances § 3-8.9(b)(5) and (6) (prohibiting exempt officers or employees from requesting a specified or minimum campaign contribution, or a specified or minimum amount of campaign assistance, from a lobbyist). (Note that the prohibition in these other jurisdictions does not apply to elected officials, while the proposed amendments to §§ 2604(b)(9)(c) and 2604(b)(11)(d) would.) Where the requested political activities may benefit the public servant or a person or entity with whom or with which the public servant is associated within the meaning of § 2601(5), then the solicitation would violate § 2604(b)(3). But where the solicited political activities would benefit someone not associated with the public servant, the solicitation would probably violate only § 2604(b)(2), violation of which, pursuant to § 2606(d), carries no fine unless the conduct also

violates the Board's (b)(2) Rule, set forth in 53 RCNY § 1-13, which it would appear not to, so long as the public servant does not thereby use City time or resources. While the Board could amend its (b)(2) Rule to incorporate such conduct, thereby making it subject to a Board fine, the Board believes that this conduct should be prohibited in the Charter itself, rather than being left to Board rulemaking. Note that under this provision, for example, an elected official's campaign committee could not solicit participation in a political campaign from a person or firm with a matter pending before the official or over which the official has control. The language of the provision is taken from the Board's advisory opinion on fundraising for the City. See Advisory Op. No. 2003-4, at p. 20.

Note that § 2604(b)(9) does not preclude a subordinate of a public servant or any other person from volunteering to work on a public servant's campaign or from engaging in any other political activities, provided that the public servant's actions otherwise comply with Chapter 68 (e.g., are done only on the public servant's personal time and do not use City resources) and do not run afoul of some other law, such as the federal Hatch Act, 5 U.S.C. § 7323, which applies to certain City officers and employees, or N.Y. Civ. Serv. Law § 107 (prohibiting, among other things, solicitation or receipt of political contributions in government offices). See Advisory Opinion No. 2003-6 (determining that a public servant may have a paid position in a superior's election campaign); Sung Mo Kim, Applicability of the Hatch Act to Municipal Officers and Employees, NYSBA/MLRC MUNICIPAL LAWYER, Vol. 20, No. 4 (Fall 2006), at p. 15.

(d) For purposes of this paragraph, participation in a political campaign shall include managing or aiding in the management of a campaign, soliciting votes or canvassing voters for a particular candidate or performing any similar acts which are unrelated to the public servant's official City duties or responsibilities.

Commentary: See Commentary to § 2604(b)(9)(c).

10. No public servant shall give or promise to give any portion of the public servant's compensation, or any money, or valuable thing to any person in consideration of having been or being nominated, appointed, elected or employed as a public servant.

11. No public servant shall, directly or indirectly,

(a) compel, induce or request any person to pay any political assessment, subscription or contribution, under threat of prejudice to or promise of or to secure advantage in rank, compensation or other job-related status or function,

(b) pay or promise to pay any political assessment, subscription or contribution in consideration of having been or being nominated, elected or employed as such public servant or to secure advantage in rank, compensation or other job-related status or function, [~~or~~]

(c) compel, induce or request any subordinate public servant to pay any political assessment, subscription or contribution, or

(d) compel, induce or request any person or entity to pay any political assessment, subscription or contribution where the public servant knows or should know that such person or entity has a specific matter either currently pending or about to be pending before the public servant or his or her agency and where it is within the legal authority or duties of the public servant to make, affect, or direct the outcome of the matter.

Commentary: See Commentary to § 2604(b)(9), which similarly applies to solicitation of political activity.

12. 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~~] a public servant from speaking on behalf of any such candidate or elected official at an occasion where a request for a political assessment, subscription or contribution may be made by others.

Commentary: "Such" is changed to "a" to make explicit that any public servant can so speak.

13. No public servant shall receive compensation except from the city for performing any official duty or accept or receive any gratuity from any person whose interests may be affected by the public servant's official action.

14. No public servant shall enter into **or maintain** any business or financial relationship with another public servant who is a superior or subordinate of such public servant.

Commentary: Public servants sometimes believe that a business or financial relationship with a superior or subordinate is “grandfathered” in if the business or financial relationship predates the superior-subordinate relationship. In fact, however, when two public servants who have a financial or business relationship become a superior and subordinate, a subsequent violation of § 2604(b)(3) becomes inevitable because anytime the superior takes an action or even attempts to take an action to benefit the subordinate, such as signing a timesheet or giving a favorable evaluation, the superior violates § 2604(b)(3). The amendment to § 2604(b)(14) will alleviate public servants’ misapprehension about any “grandfathering” in.

15. No elected official, deputy mayor, deputy to a citywide or boroughwide elected official, head of an agency, or other public servant who is charged with substantial policy discretion as defined by rule of the board may be a member of the national or state committee of a political party, serve as an assembly district leader of a political party or serve as the chair or as an officer of the county committee or county executive committee of a political party, except that a member of the council may serve as an assembly district leader or hold any lesser political office as defined by rule of the board.

16. No public servant shall solicit, negotiate for, or accept any position with any person or firm or other entity who or which is involved in a matter with the city, while such public servant is actively considering, directly concerned with, or personally participating in such matter on behalf of the city.

Commentary: This provision is transferred from current § 2604(d)(1) because it relates to actions by a public servant not after but before leaving City service and also because it should apply not just to post-City jobs but to moonlighting jobs as well. The amendments also make three changes in the text of the provision. First, they delete the prohibition in current § 2604(d)(1)(i) on soliciting, negotiating for, or accepting a position “from which, after leaving city service, the public servant would be disqualified under this subdivision [d]....” In fact, the post-employment provisions of § 2604(d) do not restrict where a public servant may work but only what he or she may do; current § 2604(d)(1)(i) is thus simply erroneous. Second, the

amendments add “or other entity,” in order to capture, for example, non-City government agencies, quasi-governmental agencies, CUNY, and SUNY, none of which are firms. See current § 2601(11) (proposed § 2601(12)); Advisory Opinion No. 94-10 and 99-06. Third, the amendments delete the word “particular” before “matter” because “particular matter” is a term of art defined in current § 2601(17) (substantively unchanged in proposed § 2601(18)) relating specifically to post-employment work by a public servant on a specific matter that he or she worked on while in City service. “Given the permanent nature of the post-employment [particular matter] prohibition [in § 2604(d)(4)], the definition of ‘particular matter’ is intended to be construed narrowly.” Vol. II, Report of the Charter Revision Commission, Dec. 1986 – Nov. 1988, at p. 152-153. By contrast, the solicitation prohibition in current § 2604(d)(1), transferred to this proposed § 2604(b)(16), need not be so narrowly construed because it is far more limited in time than § 2604(d)(4). Furthermore, the restriction should apply to soliciting a job from any person or entity with which one is involved in one’s City job, not just to those persons or entities with which one is working on a particular matter. So, too, this prohibition should capture solicitation of a job from a private person or entity, such as a lobbyist, with whom one is working on proposed legislation, a budgetary matter, or a zoning resolution, all of which are excluded from the definition of “particular matter.” Note that this § 2604(b)(16) would not apply to seeking a job with another City agency. In regard to public servants who are attorneys, see N.Y. Rules of Professional Conduct, Rule 1.11(d) (prohibiting a lawyer in public service from “negotiate[ing] for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially”).

c. This section shall not prohibit:

1. an elected official from appearing without compensation before any city agency on behalf of constituents or in the performance of public official or civic obligations;

2. a public servant from **personally and individually** accepting or receiving any benefit or **using any** facility which is provided for or made available to citizens or residents, or classes of citizens or residents, under housing or other general welfare legislation or in the exercise of the police power, **provided that the public servant may do so only upon the same terms and conditions as are**

applicable to all such citizens or residents and shall otherwise comply with the provisions of this chapter;

Commentary: The amendments make explicit that the exception is intended merely to allow the acceptance or receipt of a benefit or use of a facility available to citizens generally, on the same terms and conditions as applicable to citizens generally. The public servant must otherwise comply with the requirements of Chapter 68. Thus, for example, since any member of the public may rent certain Parks Department facilities for a wedding, Chapter 68 does not prohibit a public servant, even one working for the Parks Department, from renting such a facility for a wedding; the public servant may not, however, use his or her position to obtain a preference or a better deal in renting the facility. The addition of “personally and individually” makes explicit that the exception would not permit, for example, entering into a contract with the City to lease City-owned space for a private business or selling goods or services to the City as part of a private business. Finally, since a facility is used, not accepted or received, the word “use” has been added.

3. a public servant from obtaining a loan from any financial institution upon terms and conditions available to members of the public, **provided that the public servant shall otherwise comply with the provisions of this chapter;**

Commentary: This provision, like the other provisions in § 2604(c), provides only a limited exception to the restrictions in § 2604(b). The added proviso thus makes clear that one must otherwise comply with Chapter 68. For example, if one is involved with Chase in one’s City job, one may still, under this exception, obtain a loan from Chase on the same terms and conditions available to members of the public; but one may not use City letterhead or City resources, or misuse one’s City position, to obtain the loan.

4. any physician, dentist, optometrist, podiatrist, pharmacist, chiropractor or other person who is eligible to provide services or supplies under title eleven of article five of the social services law and is receiving any salary or other compensation from the city treasury, from providing professional services and supplies to persons who are entitled to benefits under such title, provided that, in the case of services or supplies provided by those who perform audit, review or other administrative functions pursuant to the provisions of such title, the New York state department of health reviews and approves payment for such services or

supplies and provided further that there is no conflict with their official duties **and that the public servant shall otherwise comply with the provisions of this chapter**; nothing in this paragraph shall be construed to authorize payment to such persons under such title for services or supplies furnished in the course of their employment by the city;

Commentary: See Commentary to § 2604(c)(3).

5. any member of the uniformed force of the police department from being employed in the private security field, provided that such member has received approval from the police commissioner therefor and has complied with all rules and regulations promulgated by the police commissioner relating to such employment **and further provided that the public servant shall otherwise comply with the provisions of this chapter**;

Commentary: See Commentary to § 2604(c)(3).

6. a public servant from acting as attorney, agent, broker, employee, officer, director or consultant for any not-for-profit corporation, or association, or other such entity which operates on a not-for-profit basis, **[interested in] that engages in or seeks to engage in** business dealings with the city, provided that:

Commentary: The phrase “engages in or seeks to engage in” provides greater guidance to public servants than “interested in.”

(a) such public servant takes no direct or indirect part in such business dealings;

(b) such not-for-profit entity has no direct or indirect interest in any business dealings with the city agency in which the public servant is employed and is not subject to supervision, control or regulation by such agency, except where it is determined by the head of an agency, or by the mayor where the public servant is an agency head, that such activity **[is in furtherance of] would not be in conflict with** the purposes and interests of the city;

Commentary: The amendments replace the “is in furtherance of the purposes and interests of the city” standard with the standard for granting a waiver under § 2604(e), namely “would not be in conflict with the purposes and interests of the city.”

(c) all such activities by such public servant shall be performed at times during which the public servant is not required to perform services for the city; and

(d) such public servant receives no salary or other compensation in connection with such activities;

7. a public servant, other than elected officials, employees in the office of property management of the department of housing preservation and development, employees in the department of citywide administrative services who are designated by the commissioner of such department pursuant to this paragraph, and the commissioners, deputy commissioners, assistant commissioners and others of equivalent ranks in such departments, or the successors to such departments, from bidding on and purchasing any city-owned real property at public auction or sealed bid sale, or from purchasing any city-owned residential building containing six or less dwelling units through negotiated sale, provided that such public servant, in the course of city employment, did not participate in decisions or matters affecting the disposition of the city property to be purchased and has no such matters under active consideration **and further provided that the public servant shall otherwise comply with the provisions of this chapter.** The commissioner of citywide administrative services shall designate all employees of the department of citywide administrative services whose functions relate to citywide real property matters to be subject to this paragraph; or

Commentary: See Commentary to § 2604(c)(3).

8. a public servant from participating in collective bargaining or from paying union or shop fees or dues or, if such public servant is a union member, from requesting a subordinate public servant who is a member of such union to contribute to union political action committees or other similar entities, **provided that the public servant shall otherwise comply with the provisions of this chapter.**

Commentary: See Commentary to § 2604(c)(3).

d. Post-employment restrictions.

1. ~~[No public servant shall solicit, negotiate for or accept any position (i) from which, after leaving city service, the public servant would be disqualified under this subdivision, or (ii) with any person or firm who or~~

~~which is involved in a particular matter with the city, while such public servant is actively considering, or is directly concerned or personally participating in such particular matter on behalf of the city~~ A former public servant shall not be prohibited by this subdivision from being associated with or having a position in a firm that appears before any city agency or from acting in a ministerial matter regarding business dealings with any city agency.

Commentary: On the transfer of current § 2604(d)(1) to § 2604(b)(16), see Commentary to § 2604(b)(16). The added language merely transfers the text of current § 2604(d)(7), with no substantive changes, to § 2604(d)(1), primarily in order to avoid renumbering current §§ 2604(d)(2)-(d)(6), for the reasons set forth in Commentary to § 2604(b)(1).

2. No former public servant shall, within a period of one year after termination of such person's service with the city, appear before the city agency served by such public servant; provided, however, that nothing contained herein shall be deemed to prohibit a former public servant from making communications with the agency served by the public servant which are incidental to an otherwise permitted appearance in an adjudicative proceeding before another agency or body, or a court, unless the proceeding was pending in the agency served during the period of the public servant's service with that agency. ~~[For the purposes of this paragraph, the agency served by a public servant designated by a member of the board of estimate to act in the place of such member as a member of the board of estimate, shall include the board of estimate.]~~

Commentary: The Board of Estimate no longer exists.

3. No elected official, nor the holder of the position of deputy mayor, director of the office of management and budget, commissioner of citywide administrative services, corporation counsel, commissioner of finance, commissioner of investigation or chair of the city planning commission shall, within a period of one year after termination of such person's employment with the city, appear before any agency in the branch of city government served by such person. For the purposes of this paragraph, the legislative branch of the city consists of the council and the offices of the council, and the executive branch of the city consists of all other agencies of the city, including the office of the public advocate.

4. No person who has served as a public servant shall appear, whether paid or unpaid, before the city, or receive compensation for any services rendered, in relation to any particular matter [~~involving the same party or parties~~] with respect to which [~~particular matter~~] such person had participated personally and substantially as a public servant through decision, approval, recommendation, investigation or other similar activities.

*Commentary: In order for a matter to be a “particular matter,” the matter must involve “a specific party or parties” not merely general policy issues. Current § 2601(17) (proposed § 2601(19)); Advisory Opinion No. 93-8 and 96-6. The phrase “involving the **same** party or parties” (emphasis added) in § 2604(d)(4) has not been part of the Board’s jurisprudence on the particular matter bar and in fact adds only confusion to that prohibition. If the phrase “involving the same parties or parties” is intended to mean, for example, that a public servant may negotiate a contract on behalf of the City with a firm, which then assigns that contract to a second firm, and then go to work for that second firm and work on that very same contract that he or she negotiated, then that “involving the same party or parties” language is clearly too broad and should be deleted. Note that for public servants who are attorneys, the particular matter bar extends not only to the former public servant but also to his or her firm, absent the erection of a firewall between the attorney and the rest of the firm, apportionment of no part of the fee to the attorney, written notice to the attorney’s former City agency, and any other circumstances that create an appearance of impropriety. N.Y. Rules of Professional Conduct, Rule 1.11(b).*

5. No public servant shall, after leaving city service, [~~disclose or~~] use for private advantage or disclose any confidential information [~~gained from~~] that is obtained as a result of such former public [~~service~~] servant’s city position and that [which] is not otherwise [~~made~~] available to the public; provided, however, that this shall not prohibit any former public servant from disclosing any information concerning conduct which the former public servant knows or reasonably believes to involve waste, inefficiency, corruption, criminal activity or conflict of interest.

Commentary: These amendments would conform the confidential information restriction for former public servants to that for current public servants in § 2604(b)(4). In addition, as this paragraph applies only to former public servants, the word “former” has been inserted before “public

servant.” On the placement of “disclose” after “use for private advantage,” see Commentary to § 2604(b)(4).

6. ~~[The prohibitions on negotiating for and having certain positions after leaving city service,]~~ **The provisions of paragraphs two, three and four of this subdivision** shall not apply to ~~[positions with or]~~ representation on behalf of any local, state or federal agency.

Commentary: Historically the COIB has not applied the government-to-government exception to the prohibition on the use or disclosure of confidential information, as such information may well be confidential not only from private parties but also from other government agencies. Therefore, the amendments limit the government-to-government exception to the one-year ban and the particular matter bar – i.e., paragraphs (2)-(4). Note also that, by virtue of transferring current § 2604(d)(1) to § 2604(b)(16), the government-to-government exception would not apply to negotiating for a post-City employment position with a non-City government agency with which one deals in one’s City job – nor should it.

~~[7. Nothing contained in this subdivision shall prohibit a former public servant from being associated with or having a position in a firm which appears before a city agency or from acting in a ministerial matter regarding business dealings with the city.]~~

Commentary: See Commentary to § 2604(d)(1), to which this provision is transferred.

e. ~~[Allowed positions]~~ **Waivers.**

A public servant or former public servant may hold **an ownership interest or position [or negotiate for a position], or engage in conduct, that is** otherwise prohibited by this section, where ~~[the]~~ holding ~~[of]~~ the **ownership interest or position or engaging in the conduct** would not be in conflict with the purposes and interests of the city, if, after written approval by the head of the agency or agencies involved, the board determines that the **ownership interest or position or conduct** involves no such conflict. **The board may impose such conditions upon the grant of any waiver as the board deems appropriate, consistent with the provisions of this chapter.** Such findings shall be in writing and ~~[made]~~ **shall be** public ~~[by the board]~~.

Commentary: The amendments to § 2604(e) make no changes in the current law but rather harmonize the language of the provision with the Board’s interpretation and practice. First, the amendment to the heading of the subdivision would formalize the universal name given to the permissions granted by the Board under this provision, namely “waivers.” Second, reflecting the proposed changes to § 2604(a) to fold orders into waivers, the amendments include within the Board’s waiver jurisdiction otherwise prohibited ownership interests in firms. Third, while § 2604(e) refers only to positions, the Board has, almost from its inception, interpreted the provision to authorize the Board to grant waivers as to conduct as well, in light of the purpose of the provision to “give relief in otherwise inequitable situations.” Vol. II, Report of the Charter Revision Commission, Dec. 1986 – Nov. 1988, at p. 166. See, e.g., Advisory Opinion 91-8 (Aug. 14, 1991) (granting a waiver of the one-year appearance ban). So, too, since negotiating for a position is conduct, that phrase (“negotiating for a position”) is eliminated as redundant. Fourth, as the granting of waivers is discretionary with the Board, the Board may impose reasonable conditions on the granting of a waiver and has frequently done so; the amendments make explicit that authority, although the Board may not prohibit an interest or conduct that Chapter 68 expressly permits. Finally, “made public” is changed to “shall be public” to clarify that, while waivers are public documents available for inspection and copying, the Board need not distribute them to the public.

§ 2605. [Reporting] Legislation; Inducement.

Commentary: The change in the heading reflects the addition of subdivision (b).

(a) No public servant shall attempt to influence the course of any proposed legislation in the legislative body of the city without publicly disclosing on the official records of the legislative body the nature and extent of any direct or indirect financial or other private interest the public servant may have in such legislation.

(b) No person or entity shall intentionally or knowingly solicit, request, command, importune, aid, induce or cause any public servant to engage in conduct that violates any provision of this chapter or agree with one or more persons to engage in or cause the performance of conduct that violates any provision of this chapter.

Commentary: *The Board's so-called (b)(2) Rule, set forth in 53 RCNY § 1-13 and adopted pursuant to Charter § 2606(d), expressly prohibits in § 1-13(d) a public servant from soliciting, requesting, commanding, importuning, aiding, inducing, or causing another public servant to engage in conduct that violates any provision of Charter § 2604 or from agreeing with one or more persons to engage in or cause the performance of conduct that violates any provision of § 2604. Thus, for example, Public Servant A may not induce Public Servant B to hire Public Servant B's child as a paid summer intern; by making such a hire Public Servant B would violate section 2604(b)(3), and by inducing the hire Public Servant A would violate Board Rules § 1-13(d). Such inducement of a violation of Chapter 68 reflects a significant violation in its own right, particularly where it occurs as the result of a superior's inducement of a subordinate, and should thus be set forth in Chapter 68 itself. Furthermore, private citizens, vendors, developers, applicants, and the like should not with impunity be able to cause a public servant to violate Chapter 68, subjecting the public servant to serious sanctions but the private citizen to nothing, in the absence of a bribe. The former New York State Temporary State Commission on Local Government Ethics proposed such a provision in its bill to revamp Article 18 of the New York State General Municipal Law. See proposed N.Y. Gen. Mun. Law § 802 in Senate Bill No. 6157 (A.8637) (1991), reproduced in Temporary State Commission on Local Government Ethics, Final Report, 21 FORDHAM URB. L.J. 1, 34 (1993). See also Ala. Code § 36-25-5(d) (prohibiting any person from soliciting a municipal public servant to use public resources for a private purpose); Ohio Rev. Code § 102.03(F) (prohibiting gifts to public servants); Philadelphia Code § 20-604(2) (same); Mass. Gen. Laws ch. 268A, § 17(b) (prohibiting the offering of additional compensation to public servants); Cook County (Ill.) Ethics Ordinance § 2.14 (restricting contributions to candidates for county office or elected county officials by persons who are seeking to do business with the county or have done business with the county during the previous four years); Mass. Gen. Laws ch. 268A §§ 3(a), 11(b); Pa. Stat. tit. 65, § 1103(b); R.I. Gen. Laws § 36-14-5(i).*

§ 2606. Penalties.

a. Upon a determination by the board that a violation of section twenty-six hundred four or twenty-six hundred five of this chapter, involving a contract, work, business, sale or transaction, has occurred, the board shall have the power, after

consultation with the head of the agency involved, or in the case of an agency head, with the mayor, to render forfeit and void the transaction in question.

a-1. In addition to the penalties otherwise set forth in this section, upon a determination by the board that a violation of subdivision b of section twenty-six hundred five of this chapter has occurred, the board shall have the power, after consultation with the head of the agency involved, or in the case of an agency head, with the mayor, to debar a vendor from consideration for the award of any procurement with the city for a period not to exceed two years in accordance with rules consistent with subdivision h of section twenty-six hundred three. The violation of such subdivision by any officer, director, shareholder, partner, employee, or other individual associated with a vendor may be imputed to that vendor when the conduct occurred in connection with the individual's performance of duties for or on behalf of the vendor or with the vendor's knowledge, approval, or acquiescence. The vendor's acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence. Such violation may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with that vendor who participated in, knew of, or had reason to know of the vendor's conduct. Such violation by one vendor participating in a joint venture or similar arrangement may be imputed to the other participating vendors if the conduct occurred for or on behalf of the joint venture or other similar arrangement, or with the knowledge, approval, or acquiescence of these vendors. Acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

Commentary: The threat of debarment will act as a powerful incentive for private citizens and firms not to induce or cause a public servant to violate the ethics rules, for example, by offering a prohibited gift, although debarment would also apply to a public servant who entered into a contract with the City without Board approval. This provision is based on § 2606(b-1), adopted by the voters on November 2, 2010, and on former rule of the Procurement Policy Board, 9 RCNY §§ 4-10(a)(3) and 4-10(b), although the proposed Charter amendment is limited to violations of proposed Charter § 2605(b) and includes a maximum debarment period of two years, not five years. See also King County (Wash.) Code § 3.04.060(B)(1) (providing that anyone having or

seeking a contract with the county who offers a gift to a county official or employee and who is seeking preferential treatment shall have his or her contracts cancelled and shall not be able to bid on any other county contract for two years); Los Angeles Mun. Code § 49.5.19 (A)(3) (providing that no one convicted of a misdemeanor under the ethics code shall act as a lobbyist or city contractor for four years following the date of conviction); NYS Senate Bill No. 6157 (A.8637) (1991), amending N.Y. Gen. Mun. Law § 809 (providing for debarment for a violation of Article 18 of the General Municipal Law). Note that the debarment provision would apply only to those individuals or firms who are vendors to the City and whose Chapter 68 violation arose in the context of contracting with the City.

b. Upon a determination by the board that a violation of section twenty-six hundred four or twenty-six hundred five of this chapter has occurred, the board, after consultation with the head of the agency involved, or in the case of an agency head, with the mayor, shall have the power to impose fines of up to twenty-five thousand dollars, and to recommend to the appointing authority, or person or body charged by law with responsibility for imposing such penalties, suspension or removal from office or employment.

Commentary: *This subdivision reflects the amendments to Chapter 68 adopted by the voters at the general election on November 2, 2010.*

b-1. In addition to the penalties set forth in subdivisions a and b of this section, the board shall have the power to order payment to the city of the value of any gain or benefit obtained by the respondent as a result of the violation in accordance with rules consistent with subdivision h of section twenty-six hundred three.

Commentary: *This subdivision reflects the amendments to Chapter 68 adopted by the voters at the general election on November 2, 2010.*

c. Any person who violates section twenty-six hundred four or twenty-six hundred five of this chapter shall be guilty of a misdemeanor and, on conviction thereof, shall forfeit his or her public office or employment. Any person who violates paragraph ten of subdivision b of section twenty-six hundred four, on conviction thereof, shall additionally be forever disqualified from being elected, appointed or employed in the service of the city. A public servant must be found to have had actual knowledge of a business dealing with the city in order to be found

guilty under this subdivision^[5] of a violation of subdivision a of section twenty-six hundred four of this chapter.

d. Notwithstanding the provisions of subdivisions a, b and c of this section, no penalties shall be imposed for a violation of paragraph two of subdivision b of section twenty-six hundred four unless such violation involved conduct identified by rule of the board as prohibited by such paragraph.

§ 2607 Gifts by lobbyists.

Complaints made pursuant to subchapter three of chapter two of title three of the administrative code shall be made, received, investigated and adjudicated in a manner consistent with investigations and adjudications of conflicts of interest pursuant to this chapter and chapter thirty-four.

[Charter Amendments: Charter Revision 2011: Chapter 68 Revisions 12_1_2010]