

January 9, 2020 – Open Meeting Matter

To: The Board

From: Christopher M. Hammer



Date: November 20, 2019

Re: Proposed Amendments to Board Rules § 1-13: Use of City Time and City Resources
Proposed New Board Rules § 1-17: Accomplice Liability

The Board's recent rulemaking has created the need for some housekeeping in Board Rules § 1-13, which in turn has provided an opportunity for the Board to codify its interpretation of Chapter 68 from related Advisory Opinions.

Board Rules § 1-13, titled "Conduct Prohibited by City Charter § 2604(b)(2)," appears to have been originally intended to contain all the rules interpreting and applying Charter § 2604(b)(2).¹ From 1998 until May 2019, the only codified prohibitions of Charter § 2604(b)(2) appeared in Board Rules § 1-13, specifically, restrictions related to the use of City time and City resources and to accomplice liability. However, in May 2019, the Board adopted Board Rules § 1-14, which interpreted and applied Charter § 2604(b)(2) to official fundraising; last month, the Board adopted Board Rules § 1-15, which interpreted and applied Charter § 2604(b)(2) to community board service. As a result, the language in Board Rules § 1-13 must be modified.

As reflected in the attached draft Notice of Public Hearing and Opportunity to Comment (**Exhibit 1**), Staff proposes that the Board: (1) reorganize Board Rules § 1-13 into a rule that only covers the use of City time and City resources; (2) amend Board Rules § 1-13 to codify Advisory Opinions pertaining to the use of City time and City resources; and (3) move the subsections pertaining to accomplice liability into a new Board Rules § 1-17.

¹ City Charter § 2604(b)(2) provides: "No public servant shall engage in any 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."

The amendments to Board Rules § 1-13 would:

- Confirm that a public servant's City title as well as City technology assets (such as e-mail, official social media accounts, and internet access) are City resources for purposes of City Charter § 2604(b)(2). See Proposed Board Rules § 1-13(b).
- Harmonize the language and application of Board Rules § 1-13(c) with the recently adopted Board Rules § 1-13(e) so that each of the provisions would apply only to activities performed on behalf of not-for-profit organizations.
- Codify advice given in Advisory Opinion No. 1999-4 to permit a public servant to use his or her City title in connection with the non-City authorship of print or online published work, teaching, or paid speaking engagements under circumstances where it is clear that the public servant is not speaking on behalf of the City. See Proposed Board Rules § 1-13(d).
- Codify advice given in Advisory Opinion No. 2009-5 to permit an elected official, including a District Attorney, to use his or her City title in endorsing a candidate for public office, while prohibiting any other public servant from doing so. The proposed amendment would also clarify that a public servant is not prohibited from disclosing that they are public servants when engaging in political speech—such as the biography of a candidate for City Council identifying the candidate as a community board member among the candidate's other qualifications or a participant at a political rally identifying themselves as a public school teacher. See Proposed Board Rules § 1-13(f).

These proposed amendments have been informally reviewed by the New York City Law Department; with the Board's approval, Staff will formally submit these proposed amendments to the Law Department and the Mayor's Office of Operations, as required by the City Administrative Procedure Act. See Charter Section 1043(d).

Attached to this memorandum are:

1. Draft Notice of Public Hearing and Opportunity to Comment for Board Rules §§ 1-13 and 1-17 (**Exhibit 1**); and
2. Clean Version of Proposed Amendments to Board Rules §§ 1-13 and 1-17 (**Exhibit 2**).

New York City Conflicts of Interest Board

Notice of Public Hearing and Opportunity to Comment on Proposed Rules Regarding the Use of City Time and City Resources and Accomplice Liability

What are we proposing? The Conflicts of Interest Board proposes to amend its rules regarding a public servant’s use of City time and City resources and accomplice liability.

When and where is the Hearing? The Conflicts of Interest Board will hold a public hearing on the proposed rule. The public hearing will take place at [] on []. The hearing will be at [].

This location has the following accessibility option(s) available: [].

How do I comment on the proposed rules? Anyone can comment on the proposed rules by:

- **Website.** You can submit comments to the Conflicts of Interest Board through the NYC rules website at <http://rules.cityofnewyork.us>.
- **Email.** You can email comments to Rules@COIB.nyc.gov.
- **Mail.** You can mail comments to Christopher M. Hammer, Deputy General Counsel, Conflicts of Interest Board, 2 Lafayette Street, Suite #1010, New York, New York 10007.
- **Fax.** You can fax comments to the Conflicts of Interest Board at (212) 437-0705.
- **By Speaking at the Hearing.** Anyone who wants to comment on the proposed rule at the public hearing must sign up to speak. You can sign up before the hearing by calling (212) 437-0730. You can also sign up in the hearing room before the hearing begins on []. You can speak for up to three minutes.

Is there a deadline to submit comments? Yes, you must submit written comments by [].

Do you need assistance to participate in the hearing? You must tell the Conflicts of Interest Board if you need a reasonable accommodation of a disability at the hearing. You must tell us if you need a sign language interpreter. You can tell us by mail at the address given above. You may also tell us by telephone at (212) 437-0730. You must tell us by [].

Can I review the comments made on the proposed rules? You can review the comments made online on the proposed rules by going to the website at <http://rules.cityofnewyork.us/>. A few days after the hearing, copies of all comments submitted online, copies of all written comments, and a summary of oral comments concerning the proposed rule will be available to the public at the Conflicts of Interest Board, 2 Lafayette Street, Suite #1010, New York, New York 10007.

1 **What authorizes the Conflicts of Interest Board to make this rule?** Sections 1043 and
2 2603(a) of the City Charter and authorize the Conflicts of Interest Board to make this proposed
3 rule. This proposed rule was included in the Conflicts of Interest Board’s regulatory agenda for
4 this Fiscal Year.

5
6 **Where can I find the Conflicts of Interest Board’s rules?** The Conflicts of Interest Board’s
7 rules are in Title 53 of the Rules of the City of New York.

8
9 **What rules govern the rulemaking process?** The Conflicts of Interest Board must meet the
10 requirements of Section 1043 of the City Charter when creating or changing rules. This notice is
11 made according to the requirements of Section 1043 of the City Charter.
12

13 **Statement of Basis and Purpose of the Proposed Rule**

14 The Board adopted Board Rules § 1-13 in 1998 to provide broad guidance regarding City
15 Charter § 2604(b)(2), Chapter 68’s “catch-all” provision, which prohibits a public servant from
16 engaging in “any business, transaction or private employment, or hav[ing] any financial or other
17 private interest, direct or indirect, which is in conflict with the proper discharge of his or her
18 official duties.” Pursuant to Board Rules § 1-13, City Charter § 2604(b)(2) prohibits the use of
19 City time and City resources for non-City purposes and establishes accomplice liability for the
20 Chapter 68 violations by others.

21 When initially drafted, § 1-13 was the only rule of the Board that interpreted City Charter
22 § 2604(b)(2). Since then, the Board has adopted other rules that construe various aspects of City
23 Charter § 2604(b)(2), including § 1-14 (Official Fundraising) and § 1-15 (Community Board
24 Members). The Board has also adopted two provisions as part of § 1-13 that govern the
25 permissible use of City time and City resources: Board Rules § 1-13(c) permits a public servant
26 to use a limited amount of City time and City resources to pursue a personal and private activity,
27 upon the approval of the public servant’s agency head and the Board’s determination that the
28 activity furthers the purposes and interests of the City; and Board Rules § 1-13(e) establishes

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1 parameters by which public servants may perform work on behalf not-for-profit organizations as
2 part of their City jobs.

3 Given these intervening additions and to improve the overall organizational structure of
4 the Board Rules, the Board now proposes (1) to reorganize Board Rules § 1-13 into a rule that
5 focuses exclusively on the use of City time and City resources, and (2) to move the provisions
6 regarding accomplice liability into a new Board Rules § 1-17.

7 In focusing Board Rules § 1-13 on the use of City time and City resources, the Board also
8 proposes several amendments to § 1-13 to codify advice given in two Advisory Opinions that
9 reflect the Board's practice regarding the use of City time and City resources:

- 10 • Proposed Board Rules § 1-13(b) would clarify that a public servant's City title
11 as well as City technology assets (such as e-mail, official social media
12 accounts, and internet access) are City resources for purposes of City Charter
13 § 2604(b)(2).
14
- 15 • Proposed Board Rules § 1-13(c) would become consistent with Board Rules §
16 1-13(e) so that each of these provisions would apply only to activities
17 performed on behalf of not-for-profit entities.
18
- 19 • Proposed Board Rules § 1-13(d), a new provision, would clarify that a public
20 servant may use his or her City title in connection with the non-City
21 authorship of print or online published work, teaching, and paid speaking
22 engagements under circumstances where it is clear that the public servant is
23 not speaking on behalf of the City. This proposed amendment would codify,
24 in part, advice given in Advisory Opinion No. 1999-4 permitting a public
25 servant who engages in teaching to list his or her title as part of biographical
26 information about the public servant. See A.O. No. 1999-4 at 7.
27
- 28 • Proposed Board Rules § 1-13(f) would codify the advice given in Advisory
29 Opinion No. 2009-5 permitting an elected official, including a District
30 Attorney, to use his or her City title in endorsing a candidate for public office.
31 See A.O. No. 2009-5 at 3 n. 1. The proposed section would clarify that other
32 public servants may not use their titles in endorsing candidates for public
33 office but it would not otherwise prohibit them from disclosing that they are
34 public servants when engaging in political speech—such as the biography of a
35 candidate for City Council identifying the candidate as a community board

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1 member among the candidate's other qualifications or a participant at a
2 political rally identifying themselves as a public school teacher.
3
4

5 **Text of the Proposed Rule**

6 New Material is underlined.

7 [Deleted material is in brackets.]

8 **Section 1.** Section 1-13 of Title 53 of the Rules of the City of New York is amended to read as
9 follows:

10 **§ 1-13** [~~Conduct Prohibited by City Charter § 2604(b)(2)~~]Use of City Time and City

11 Resources.

12 (a) Except as provided in subdivision (c) of this section, it shall be a violation of City Charter
13 § 2604(b)(2) for any public servant to pursue personal and private activities during times
14 when the public servant is required to perform services for the City.

15 (b) Except as provided in [subdivision (c) of] this section, it shall be a violation of City
16 Charter § 2604(b)(2) for any public servant to use City letterhead, title, personnel,
17 equipment, resources, [or] supplies, or technology assets for any non-City purpose. For
18 purposes of this subdivision "technology assets" includes but is not limited to e-mail
19 accounts, internet access, and official social media accounts.

20 (c) (1) A public servant may [pursue a personal and private activity during normal business
21 hours] perform volunteer services on behalf of a not-for-profit entity during times when
22 the public servant is required to perform work for the City and may use City personnel,
23 equipment, resources, [personnel, and] supplies, and technology assets, but not City
24 letterhead, [if] his or her title or email account(s), provided that

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1 (i) [the type of activity has been previously approved for employees of the public
2 servant's agency by the Conflicts of Interest Board, upon application by the
3 agency head and upon a determination by the Board that the activity furthers the
4 purposes and interests of the City] the public servant's agency head approves in
5 writing the proposed volunteer services; and

6 (ii) [the public servant shall have received approval to pursue such activity from the
7 head of his or her agency]the Board determines that the proposed volunteer
8 services advance the professional development of such public servant, further the
9 purposes and interests of the City, or benefit the public at large.

10 (2) [In any instance where a particular activity may potentially directly affect another
11 City agency, the employee must obtain approval from his or her agency head to
12 participate in such particular activity. The agency head shall provide written notice to
13 the head of the potentially affected agency at least 10 days prior to approving such
14 activity.] The agency head approval required by paragraph (1) of this subdivision
15 must be by the head of the agency served by the public servant or by a deputy mayor
16 if the public servant is an agency head. A public servant who is an elected official,
17 including a district attorney, is the agency head for the public servants employed by
18 the official's agency or office. A public servant who is an elected official, including a
19 district attorney, may provide the agency head approval pursuant to paragraph (1) for
20 himself or herself.

21 (d) [It shall be a violation of City Charter § 2604(b)(2) for any public servant to intentionally
22 or knowingly:] A public servant engaging in a personal and private activity may use or
23 permit the use of his or her City title in connection with non-City authorship of print or

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1 online published work, teaching, or paid speaking engagements, under either of the
2 following circumstances:

3 (1) [solicit, request, command, importune, aid, induce or cause another public servant to
4 engage in conduct that violates any provision of City Charter § 2604] their City title
5 is one of several biographical details used to identify the public servant; or

6 (2) [agree with one or more persons to engage in or cause the performance of conduct
7 that violates any provision of City Charter § 2604] their City title is used to
8 demonstrate the relevant professional qualifications of the public servant, provided
9 that their City title is accompanied by a reasonably prominent disclaimer stating that
10 the views expressed do not necessarily represent the views of the agency or the City.

11 (e) (1) An agency head may designate a public servant to perform work on behalf of a not-
12 for-profit corporation, association, or other such entity that operates on a not-for-profit
13 basis, including serving as a board member or other position with fiduciary
14 responsibilities provided that:

15 (i) there is a demonstrated nexus between the proposed activity, the public servant's
16 City job, and the mission of the public servant's agency; and such work furthers
17 the agency's mission and is not undertaken primarily for the benefit or interests of
18 the not-for-profit;

19 (ii) the designated public servant takes no part in the entity's business dealings with
20 the City at the entity or at his or her agency, except that Council Members may
21 sponsor and vote on discretionary funding for the entity; and

22 (iii) within 30 days the written designation is disclosed to the Conflicts of Interest
23 Board and will be posted on the Board's website.

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1 (2) A public servant designated in accordance with paragraph (1) of this subdivision may
2 take part in such entity's business dealings with the City at the entity and/or at his or
3 her agency if, after written approval of the agency head, the Board determines that
4 there is a demonstrated nexus between the proposed participation, the public servant's
5 City job, and the mission of the public servant's agency; and that such participation
6 furthers the agency's mission and is not undertaken primarily for the benefit or
7 interests of the not-for-profit entity.

8 (3) The designation made pursuant to paragraph (1) and approval made pursuant to
9 paragraph (2) of this subdivision must be by the head of the agency served by the
10 public servant, or by a deputy mayor if the public servant is an agency head. A public
11 servant who is an elected official, including a district attorney, is the agency head for
12 the public servants employed by the official's agency or office. A public servant who
13 is an elected official, including a district attorney, may provide the designation
14 pursuant to paragraph (1) and the agency head approval pursuant to paragraph (2) for
15 him or herself.

16 (f) [Nothing contained in this section shall preclude the Conflicts of Interest Board from
17 finding that conduct other than that proscribed by subdivisions (a) through (d) of this
18 section violates City Charter § 2604(b)(2), although the Board may impose a fine for a
19 violation of City Charter § 2604(b)(2) only if the conduct violates subdivision (a), (b),
20 (c), or (d) of this section. The Board may not impose a fine for violation of subdivision
21 (d) where the public servant induced or caused another public servant to engage in
22 conduct that violates City Charter § 2604(b)(2), unless such other public servant violated
23 subdivision (a), (b), or (c) of this section] An elected official, including a District

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1 Attorney, may use or permit the use of his or her City title in connection with his or her
2 endorsement of a candidate for elective office. No other public servant may use or permit
3 the use of his or her City title in connection with another person's campaign for elective
4 office, except that a public servant is not otherwise prohibited from referring to
5 themselves as a public servant when engaging in political speech.

6 **Section 2.** Title 53 of the Rules of the City of New York is amended by adding a new section 1-
7 17, to read as follows:

8 **§ 1-17 Accomplice Liability.**

9 (a) It shall be a violation of City Charter § 2604(b)(2) for any public servant to intentionally
10 or knowingly:

11 (1) solicit, request, command, importune, aid, induce, or cause another public servant to
12 engage in conduct that violates any provision of City Charter § 2604; or

13 (2) agree with one or more persons to engage in or cause the performance of conduct that
14 violates any provision of City Charter § 2604.

15 (b) The Board shall not impose a fine for violation of this section where the public servant
16 induced or caused another public servant to engage in conduct that violates City Charter §
17 2604(b)(2), unless such other public servant's violation involved conduct identified by a
18 rule of the Board as prohibited by such paragraph.

1 **§ 1-13 Use of City Time and City Resources.**

2 (a) Except as provided in subdivision (c) of this section, it shall be a violation of City Charter
3 § 2604(b)(2) for any public servant to pursue personal and private activities during times
4 when the public servant is required to perform services for the City.

5 (b) Except as provided in this section, it shall be a violation of City Charter § 2604(b)(2) for
6 any public servant to use City letterhead, title, personnel, equipment, resources, supplies,
7 or technology assets for any non-City purpose. For purposes of this subdivision
8 “technology assets” includes but is not limited to e-mail accounts, internet access, and
9 official social media accounts.

10 (c) (1) A public servant may perform volunteer services on behalf of a not-for-profit entity
11 during times when the public servant is required to perform work for the City and may use
12 City personnel, equipment, resources, supplies, and technology assets, but not City
13 letterhead, his or her title or email account(s), provided that

14 (i) the public servant’s agency head approves in writing the proposed volunteer
15 services; and

16 (ii) the Board determines that the proposed volunteer services advance the professional
17 development of such public servant, further the purposes and interests of the City,
18 or benefit the public at large.

19 (2) The agency head approval required by paragraph (1) of this subdivision must be by the
20 head of the agency served by the public servant or by a deputy mayor if the public
21 servant is an agency head. A public servant who is an elected official, including a
22 district attorney, is the agency head for the public servants employed by the official’s
23 agency or office. A public servant who is an elected official, including a district

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1 attorney, may provide the agency head approval pursuant to paragraph (1) for himself
2 or herself.

3 (d) A public servant engaging in a personal and private activity may use or permit the use of
4 his or her City title in connection with non-City authorship of print or online published
5 work, teaching, or paid speaking engagements, under either of the following
6 circumstances:

7 (1) their City title is one of several biographical details used to identify the public servant;
8 or

9 (2) their City title is used to demonstrate the relevant professional qualifications of the
10 public servant, provided that their City title is accompanied by a reasonably prominent
11 disclaimer stating that the views expressed do not necessarily represent the views of
12 the agency or the City.

13 (e) (1) An agency head may designate a public servant to perform work on behalf of a not-for-
14 profit corporation, association, or other such entity that operates on a not-for-profit basis,
15 including serving as a board member or other position with fiduciary responsibilities
16 provided that:

17 (i) there is a demonstrated nexus between the proposed activity, the public servant's
18 City job, and the mission of the public servant's agency; and such work furthers the
19 agency's mission and is not undertaken primarily for the benefit or interests of the
20 not-for-profit;

21 (ii) the designated public servant takes no part in the entity's business dealings with the
22 City at the entity or at his or her agency, except that Council Members may sponsor
23 and vote on discretionary funding for the entity; and

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1 (iii) within 30 days the written designation is disclosed to the Conflicts of Interest
2 Board and will be posted on the Board's website.

3 (2) A public servant designated in accordance with paragraph (1) of this subdivision may
4 take part in such entity's business dealings with the City at the entity and/or at his or
5 her agency if, after written approval of the agency head, the Board determines that there
6 is a demonstrated nexus between the proposed participation, the public servant's City
7 job, and the mission of the public servant's agency; and that such participation furthers
8 the agency's mission and is not undertaken primarily for the benefit or interests of the
9 not-for-profit entity.

10 (3) The designation made pursuant to paragraph (1) and approval made pursuant to
11 paragraph (2) of this subdivision must be by the head of the agency served by the public
12 servant, or by a deputy mayor if the public servant is an agency head. A public servant
13 who is an elected official, including a district attorney, is the agency head for the public
14 servants employed by the official's agency or office. A public servant who is an elected
15 official, including a district attorney, may provide the designation pursuant to
16 paragraph (1) and the agency head approval pursuant to paragraph (2) for him or
17 herself.

18 (f) An elected official, including a District Attorney, may use or permit the use of his or her
19 City title in connection with his or her endorsement of a candidate for elective office. No
20 other public servant may use or permit the use of his or her City title in connection with
21 another person's campaign for elective office, except that a public servant is not otherwise
22 prohibited from referring to themselves as a public servant when engaging in political
23 speech.

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1 **§ 1-17 Accomplice Liability.**

2 (a) It shall be a violation of City Charter § 2604(b)(2) for any public servant to intentionally
3 or knowingly:

4 (1) solicit, request, command, importune, aid, induce, or cause another public servant to
5 engage in conduct that violates any provision of City Charter § 2604; or

6 (2) agree with one or more persons to engage in or cause the performance of conduct that
7 violates any provision of City Charter § 2604.

8 (b) The Board shall not impose a fine for violation of this section where the public servant
9 induced or caused another public servant to engage in conduct that violates City Charter §
10 2604(b)(2), unless such other public servant's violation involved conduct identified by a
11 rule of the Board as prohibited by such paragraph.