

March 26, 2020, Agenda – Open Meeting Matter
February 4, 2020, Agenda – Open Meeting Matter
January 9, 2020, Agenda – Open Meeting Matter

To: The Board
From: Chad H. Gholizadeh
Date: February 20, 2020 *CHG*
Re: Proposed Amendments to Board Rules § 1-07: Post-Employment

Staff has made the changes to the Draft Notice of Public Hearing and Opportunity to Comment requested by the Board at the February 4, 2020 open meeting. In the revised Notice of Public Hearing and Opportunity to Comment, Staff has included a list of the advisory opinions addressed by the rule and additional context regarding the Board's review of requests for post-employment waivers. Additionally, Staff has revised the language of proposed Board Rules § 1-07 to, among other thing, clarify that when a consulting arrangement does not meet all the requirements of proposed Board Rules § 1-07(d)(1) a waiver of the post-employment restrictions will still be available.

If the Board approves the proposed rule, Staff will formally submit it to the New York City Law Department and Mayor's Office of Operations, as required by the City Administrative Procedure Act. See Charter § 1043(d).

Attached are the following:

- 1) Minutes of the January 2020 Open Meeting (**Exhibit 1**);
- 2) Minutes of the February 2020 Open Meeting (**Exhibit 2**)
- 3) Draft Notice of Public Hearing and Opportunity to Comment (**Exhibit 3**); and
- 4) Draft Notice of Public Hearing and Opportunity to Comment, with changes tracked to the version discussed at the February 2020 Open Meeting, (**Exhibit 4**).

Minutes of the Open Meeting of the New York City Conflicts of Interest Board

Date: January 9, 2020

Location: Conflicts of Interest Board, 2 Lafayette Street, Suite 1010, New York, New York

Present:

Board Members: Chair Richard Briffault and Members Fernando A. Bohorquez, Jr., Anthony Crowell, Jeffrey D. Friedlander, and Erika Thomas.

Board Staff: Ethan Carrier, Chad Gholizadeh, Ana Gross, Christopher Hammer, Gavin Kendall, Julia Lee, Carolyn Miller, Katherine Miller, Ari Mulgay, Yasong Niu, Jeffrey Tremblay, Clare Wiseman, and Juliya Ziskina.

Guests: Thomas Speaker, Reinvent Albany

The meeting was called to order by the Chair at approximately 10:15 a.m. The Chair stated that the meeting was being conducted pursuant to the New York State Open Meetings Law and designated the undersigned as the Recording Secretary for purposes of the meeting.

The Chair stated that the meeting was called to discuss proposed amendments to Board Rules §§ 1-13, 1-17, 1-07, and 1-01(h).

Board Rules §§ 1-13 and 1-17

After a brief introduction, the Chair asked for any comments by the Board or Staff.

The following comments constitute the changes as agreed upon by the Board and Staff to the proposed amendments to Board Rules §§ 1-13 and 1-17:

- Statement of Basis and Purpose, p. 3, line 7: revise paragraph to clarify which bullet points refer to the two Advisory Opinions
- Explain in Statement of Basis and Purposes that the three options in Board Rules § 1-13(c)(1)(ii) are disjunctive
- Board Rules § 1-13(f): replace “themselves” with “their position”

Upon motion duly made and seconded, the Board unanimously voted to adopt the proposed amendments incorporating the changes as discussed as the final rules.

Board Rules § 1-07

After an introduction by Staff, the Chair asked for any comments by the Board or Staff.

The following constitutes the comments by the Board and Staff:

§ 1-07(a) Post-Employment Appearances:

- Start Board Rules § 1-07(a) with core prohibited conduct from the City Charter
- End Board Rules § 1-07(a)(2) after the word “matters.”
- Incorporate the examples listed in Board Rules §1-07(a)(2)(i) through (iii) into the Statement of Basis and Purpose

- Harmonize use of “appear” instead of “communicate” throughout rule

§ 1-07(b): Date of Termination of City Service: No comments

§ 1-07(c): Waivers of Post-Employment Restrictions

The Board and Staff discussed generally the history, purpose, and reasons for codifying into a rule the factors to be used in granting waivers of post-employment restrictions. The discussion focused on what factors should be considered, the revision and reformatting of language for clarification, and the inclusion of the historic four-factor “exigent circumstances” test and a detailed analysis of the Advisory Opinions in the Statement of Basis and Purpose. The discussion concluded with the Board and Staff agreeing that the rule would provide guidance to both the public servant requesting the waiver and to the Board and Staff in deciding to grant or deny the request.

The following constitutes specific changes as agreed upon by the Board and Staff:

- Board Rules § 1-07(c)(1); remove “and that is benefits the City”
- Board Rules § 1-07(c)(1): replace “bv weighing each of the” with “ “including but not limited to” language with respect to the individual factors
- Board Rules § 1-07(c)(1)(iii) and (x): move these two factors into another section
- Board Rules § 1-07(c)(1)(iv) and (v): consider combining into one factor
- Board Rules § 1-07(c)(1)(vii): consider revising so that it is clear to in which direction the factor flows
- Board Rules § 1-07(c)(1)(viii); clarify about inside information/connections
- Board Rules § 1-07(c)(1)(ix): replace “fewer than 60 days” with general language such as “relatively short period of time”
- Add as a factor the third factor from the four-factor exigent circumstances test concerning likelihood of harm to other similar organizations
- Combine other factors wherever possible so that there are fewer factors
- Add to Statement of Basis and Purpose the four-factor “exigent circumstances” test and an explanation of why the Board is moving away from that test
- Reorganize the Statement of Basis and Purposes in order to group the Advisory Opinions by subject area rather than the string cite on pages 2 and 3.

§ 1-07(d): Consulting for a Former City Agency:

- Board Rules § 1-07(d)(1)(ii): replace “six months” with non-specific time frame, proportional to the work being undertaken
- Board Rules § 1-07(d)(2): replace “subsequent employer” with “private firm”
- Board Rules § 1-07(d)(2)(ii): remove “substantial”

Upon motion duly made and seconded, the Board unanimously voted to continue discussions at the next open meeting.

Board Rules § 1-01(h)

After a brief introduction, the Chair asked for any comments by the Board or Staff. The Board and Staff agreed to replace “a” with “the” in Board Rules §1-10(h)(1)(iv).

Upon motion duly made and seconded, the Board unanimously voted to adopt the proposed amendments incorporating the one change discussed as the final rule.

The open meeting was adjourned at approximately 11:25 a.m.

Respectfully submitted,

Julia H. Lee
Recording Secretary

Minutes of the Open Meeting of the New York City Conflicts of Interest Board

Date: February 4, 2020

Location: Conflicts of Interest Board, 2 Lafayette Street, Suite 1010, New York, New York

Present:

Board Members: Chair Richard Briffault and Members Fernando A. Bohorquez, Jr., Anthony Crowell, Jeffrey D. Friedlander, and Erika Thomas.

Board Staff: Ethan Carrier, Chad Gholizadeh, Ana Gross, Christopher Hammer, Gavin Kendall, Julia Lee, Carolyn Miller, Katherine Miller, Ari Mulgay, Yasong Niu, Jeffrey Tremblay, Clare Wiseman, and Juliya Ziskina.

Guests: Thomas Speaker, Reinvent Albany

The meeting was called to order by the Chair at approximately 9:35 a.m. The Chair stated that the meeting was being conducted pursuant to the New York State Open Meetings Law and designated the undersigned as the Recording Secretary for purposes of the meeting.

The Chair stated that the meeting was called to discuss proposed amendments to Board Rules § 4-05, Chapter 3, § 1-18, and § 1-07.

Board Rules § 4-05

After a brief introduction, the Chair asked for any comments by the Board or Staff.

There were no comments. Upon motion duly made and seconded, the Board unanimously voted to adopt the proposed amendments incorporating the proposed changes as the final rule.

Board Rules Chapter 3

After a brief introduction, the Chair asked for any comments by the Board or Staff.

There were no comments. Upon motion duly made and seconded, the Board unanimously voted to adopt the proposed amendments incorporating the proposed changes as the final rule.

Board Rules § 1-18

After a brief introduction, the Chair asked for any comments by the Board or Staff.

In the Statement of Basis and Purpose, the Board asked, and Staff agreed, to cite to examples from the advisory opinions to clarify the term “demonstrable nexus.”

Upon motion duly made and seconded, the Board unanimously voted to continue discussions at the next open meeting.

Board Rules § 1-07

After a brief introduction, the Chair asked for any comments by the Board or Staff.

The following comments constitute the changes as agreed upon by the Board and Staff to the proposed amendments to Board Rules § 1-07:

In the Statement of Basis and Purpose:

- Insert a sentence or two in the introduction to provide context for the purpose of the rule
- Include a list of the advisory opinions incorporated and not incorporated in the rule
- p. 4, carryover sentence: remove “switching sides” and replace “appearances” with “working paid or unpaid,”
- p. 11, line 12: insert “this” before factor
- p. 12, line 1: heading number to be changed to 3

In the text of Board Rules § 1-07:

- Insert “former” before “public servant” where applicable throughout rule
- § 1-07(c)(1): revise “may waive” to “in determining whether to waive the post-employment restrictions, the Board will consider” to make clear it is the Board’s determination
- § 1-07(c)(1)(ii): replace “placed” with “suited”
- § 1-07(c)(1)(iv): Insert a period after employer and delete the rest of the sentence. Incorporate 1 and 2 into the Statement of Basis and Purpose
- § 1-07(c)(1)(iv): change wording to the negative, so that a positive answer would weigh in favor of the granting of a waiver, consistent with (i)-(iii)
- § 1-07(c)(2)(i): delete “made by City agencies”
- § 1-07(d)(1): rethink the language referring to the completion of a project to properly reflect the type of consulting work addressed in the rule
- § 1-07(d)(1)(iv): replace “significantly higher” with “similar to” or “comparable to”
- Insert additional subsection stating that in the event a proposed consulting arrangement does not meet the requirements of § 1-07(d)(1) a waiver from the Board can be sought
- § 1-07(d)(2)(i): revise to state that the former public servant did not have a role in recommending or selecting the private firm

Upon motion duly made and seconded, the Board unanimously voted to continue discussions at the next open meeting.

The open meeting was adjourned at approximately 10:30 a.m.

Respectfully submitted,

Julia H. Lee
Recording Secretary

1 **New York City Conflicts of Interest Board**

2
3 **Notice of Public Hearing and Opportunity to Comment on Proposed Rules Regarding Post-**
4 **Employment Restrictions**

5
6 **What are we proposing?** The Conflicts of Interest Board is proposing to establish rules governing the
7 issuance of waivers of the post-employment restrictions and the definition of terms related to those
8 restrictions.

9
10 **When and where is the Hearing?** The Conflicts of Interest Board will hold a public hearing on the
11 proposed rule. The public hearing will take place at [time] on [date]. The hearing will be at [location].

12
13 This location has the following accessibility option(s) available: []

14
15 **How do I comment on the proposed rules?** Anyone can comment on the proposed rules by:

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17 • **Website.** You can submit comments to the Conflicts of Interest Board through the NYC rules
18 website at <http://rules.cityofnewyork.us>.
19
20 • **Email.** You can email comments to Chad H. Gholizadeh at Rules@COIB.nyc.gov
21
22 • **Mail.** You can mail comments to Chad H. Gholizadeh, Assistant Counsel, Conflicts of Interest
23 Board, 2 Lafayette Street, Suite #1010, New York, New York 10007.
24
25 • **Fax.** You can fax comments to the Conflicts of Interest Board at (212) 437-0705.
26
27 • **By Speaking at the Hearing.** Anyone who wants to comment on the proposed rule at the public
28 hearing must sign up to speak. You can sign up before the hearing by calling (212) 437-xxxx. You
29 can also sign up in the hearing room before the hearing begins on [date]. You can speak for up to
30 three minutes.

31
32 **Is there a deadline to submit comments?** Yes, you must submit written comments by [date].

33
34 **Do you need assistance to participate in the hearing?** You must tell the Conflicts of Interest Board if
35 you need a reasonable accommodation of a disability at the hearing. You must tell us if you need a sign
36 language interpreter. You can tell us by mail at the address given above. You may also tell us by
37 telephone at (212) 437-0723. You must tell us by [date].

38
39 **Can I review the comments made on the proposed rules?** You can review the comments made
40 online on the proposed rules by going to the website at <http://rules.cityofnewyork.us/>. A few days after
41 the hearing, copies of all comments submitted online, copies of all written comments, and a summary of
42 oral comments concerning the proposed rule will be available to the public at the Conflicts of Interest
43 Board, 2 Lafayette Street, Suite #1010, New York, New York 10007.

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45 **What authorizes the Conflicts of Interest Board to make this rule?** Sections 1043, 2603(a), and
46 2603(c)(4) of the City Charter authorize the Conflicts of Interest Board to make this proposed rule.

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

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

STATEMENT OF BASIS AND PURPOSE

The post-employment restrictions of Chapter 68 of the City Charter, contained in Charter § 2604(d), were primarily created to balance two competing City interests: the need to recruit to public service talented individuals who may wish to return to or pursue private sector employment, and the need to prevent public servants from trading on connections made in City government service or using confidential City information for the benefit of themselves or future employers. See Volume I, Report of the New York City Charter Revision Commission, December 1986 – November 1988, at 28-29; see, e.g., Advisory Opinions (“A.O.”) Nos. 1993-11 at 6, 1993-12 at 4, 1994-15 at 11-12; 1996-1 at 7. Restrictions on the conduct of former public servants pre-date the existence of the current Conflicts of Interest Board. See, e.g., A.O. No. 1989-1 (advising that the post-employment restrictions of the former Code of Ethics applied to City employees who had resigned or retired, been terminated, or had been on discretionary leaves of absence before the revised post-employment restrictions of the current Chapter 68 became effective); A.O. No. 1992-2 (advising a public servant, who had resigned before the revised post-employment restrictions of the current Chapter 68 became effective, about the applicability of the post-employment restrictions of the Code of Ethics).

Since 1989, the Board has issued 31 advisory opinions, totaling 210 pages, providing guidance on the application of the post-employment restrictions set forth in Charter § 2604(d) and on how the Board has considered requests for waivers of those restrictions. Because of the

1 limited scope and duration of the post-employment restrictions, requests for waivers of Charter §
2 2604(d) are never merely technical, and the Board has engaged in detailed review of the
3 competing interests at issue in each request. With the benefit of almost 30 years of experience in
4 evaluating requests for post-employment waivers, and in fulfillment of its Charter mandate under
5 Charter § 2603(c)(4) to determine which of its advisory opinions “has interpretative value in
6 construing provisions of this chapter,” the Board proposes to codify:

- 7 • Definitions of terms within Charter § 2604(d), such as “agency served” and
8 “termination of service.”
- 9 • A new “totality of the circumstances” standard with a non-exclusive list of four
10 factors, drawn from advisory opinions, the Board will consider in evaluating requests
11 for waivers of the post-employment restrictions.
- 12 • The standard, also from advisory opinions, for evaluating a unique type of post-
13 employment work: consulting for one’s former City agency, known as “consulting
14 back.”

15 The proposed rule addresses the following 25 advisory opinions:

16 A.O. No. 1989-1, A.O. No. 1991-8, A.O. No. 1991-19, A.O. No. 1992-2,
17 A.O. No. 1992-13, A.O. No. 1992-17, A.O. No. 1992-37, A.O. No. 1992-
18 38, A.O. No. 1993-11, A.O. No. 1993-12, A.O. No. 1993-18, A.O. No.
19 1993-30, A.O. No. 1994-15, A.O. No. 1994-19, A.O. No. 1994-22, A.O.
20 No. 1995-1, A.O. No. 1996-1, A.O. No. 1998-11, A.O. No. 2000-2, A.O.
21 No. 2007-1, A.O. No. 2008-1, A.O. No. 2008-4, A.O. No. 2009-5, A.O.
22 No. 2012-2, and A.O. No. 2019-1.

23 With the exception of the “consulting back” standard, the proposed rule does not address the
24 advisory opinions interpreting Charter § 2604(d)(6), which the Board reserves for the subject of
25 possible rulemaking in the future. See A.O. No. 1993-13, A.O. No. 1994-7, A.O. No. 1994-21,
26 A.O. No. 1997-1, and A.O. No. 1999-3. The Board has determined not to adopt A.O. No. 1992-
27 32, which applies only to the public servant who requested that advisory opinion.

1 **1. Definitions**

2 **a. Post-Employment Appearances**

3 Charter § 2604(d)(2) prohibits a former public servant from appearing before his or her
4 former City agency served for one year after leaving City service. Charter § 2603(d)(3) expands
5 this prohibition to the entire branch of City government served for former elected officials and
6 certain high-level former appointed public servants who have Citywide responsibilities. Charter
7 § 2604(d)(4) prohibits a former public servant from working on the same particular matter on
8 which he or she worked in City service for the lifetime of that matter and from communicating
9 with any City agency regarding that particular matter, whether unpaid or unpaid. Therefore, to
10 determine whether a particular communication is prohibited by Charter § 2604(d), the Board
11 must determine whether the communication is with the agency or branch of government served
12 by the former public servant or with the City; either because it is with a governmental body on
13 which an employee of that agency or branch of government sits or because it is with an
14 employee of that agency or branch of government who may not be acting in his or governmental
15 capacity.

16 Proposed Board Rules § 1-07(a)(1) would codify the Board's long-standing interpretation
17 that the post-employment restrictions of Charter § 2604(d)(2), § 2604(d)(3), and § 2604(d)(4)
18 prohibit a former public servant from appearing before or communicating with any governmental
19 board or commission on which a representative of his or her former City agency, branch of City
20 government, or the City sits. For example, an employee of the New York City Department of
21 Housing Preservation and Development ("HPD") would be prohibited by Charter § 2604(d)(2)
22 from appearing before the board of the New York City Housing Development Corporation
23 ("HDC") within their first post-employment year because a representative of HPD sits on the

1 board of HDC. See A.O. No. 2008-1 (advising that when a public servant simultaneously holds
2 positions at multiple City agencies the post-employment appearance restriction of Charter §
3 2604(d)(2) applies to each position); see also COIB v. Sirefman, COIB Case No. 2007-847
4 (2009) (fining the former Interim President of the New York City Economic Development
5 Corporation (“EDC”) \$1,500 for appearing before the Hudson Yards Development Corporation
6 (“HYDC”) within one year of his resignation from EDC because the EDC President was present
7 at a meeting attended by the former Interim President in the EDC President’s capacity as an *ex-*
8 *officio* Member and Director of HYDC). By contrast, the former HPD employee would not be
9 prohibited from communicating with employees of HDC because that appearance is not before
10 the board on which their former agency’s representatives sit by operation of law.

11 Proposed Board Rules § 1-07(a)(2), would codify the Board’s interpretation that the
12 appearance and communication restrictions of Charter § 2604(d) exclude appearances and
13 communications related to non-City matters. In particular, the Board has advised public servants
14 that the following communications do not violate Charter § 2604(d): (1) social communications;
15 (2) efforts to solicit a public servant’s personal legal business or other types of personal services;
16 and (3) efforts to secure endorsements for a run for political office by a former public servant are
17 not prohibited by Charter § 2604(d). See A.O. No. 2009-5 (advising a former public servant that
18 the post-employment appearance restriction did not prohibit communication with a current
19 public servant in their private capacity, such as reaching out to perform personal legal work,
20 asking them to leave City employment to join the former public servant’s new firm, or to solicit a
21 political endorsement).

22 **b. Date of Termination of City Service**

1 To advise a public servant about the post-employment restrictions, the Board must
2 determine when the public servant's City service terminated. In proposed Board Rules § 1-
3 07(b)(1), the Board would incorporate the method of calculating the date of a public servant's
4 termination from City service set forth in A.O. Nos. 1998-11 and 2019-1, that is, the last day
5 such former public servant performed official City duties or received benefits conditioned upon
6 current City employment after resigning, retiring, or being terminated. The one-year appearance
7 prohibition of Charter § 2604(d)(2) would run from that date.

8 In proposed Board Rules § 1-07(b)(2), the Board would retain the substance of existing
9 Board Rules § 1-07 and would codify A.O. No. 2008-1 for public servants who serve multiple
10 City agencies. See also A.O. No. 1993-30 (providing advice on the tolling dates of the one-year
11 appearance restriction to a public servant who served two agencies in succession before leaving
12 City service). The proposed rule would clarify that a former public servant who has served more
13 than one City agency, concurrently or sequentially, is prohibited from appearing before each
14 such agency for one year after the termination of service, as determined by proposed Board
15 Rules § 1-07(b)(1), with each such agency.

16 2. Otherwise Prohibited Conduct

17 a. Waivers of the Post-Employment Restrictions

18 In contrast to the broad prohibitions against full-time public servants having ownership
19 interests in or positions at firms that do business with *any* City agency, for the vast majority of
20 public servants, the post-employment appearance restrictions apply *only* to a former public
21 servant's communications with their former employing City agency or branch of government and
22 *only* for one year after leaving City service; similarly, the lifetime post-employment particular
23 matter restriction applies only to a narrow set of matters (as defined in Charter § 2601(17)) on

1 which a former public servant worked personally and substantially while in City service. See,
2 e.g., A.O. No. 1992-38 (advising that a public servant was not prohibited from working on a
3 project where her involvement had been personal but not substantial). Because public servants
4 requesting waivers of the post-employment restrictions are seeking to engage in conduct in
5 which the relationships developed in their former City position may influence decision-making
6 by their former City agency, or that may put them in a position to utilize their superior familiarity
7 with, and ability to navigate, the subtle culture of their former agency to achieve preferential
8 treatment for their private employer, or involve the exact particular matters on which the former
9 public servant personally and substantially worked while in City service, the Board has analyzed
10 requests for waivers of the post-employment restrictions differently from waivers of other
11 provisions of Chapter 68.

12 In evaluating the many requests for waivers it has received, the Board has sought to
13 balance adhering to the integrity of the post-employment restrictions of the Charter with the
14 asserted need for a particular former public servant to engage in otherwise prohibited conduct to
15 further an identified City interest. In A.O. No. 1991-8, the Board announced that it would issue
16 waivers of Chapter 68's post-employment restrictions "sparingly, and only in exigent cases."
17 A.O. No. 1991-8 at 2-3; see also A.O. No.1992-13 (declining to issue a waiver to a public
18 servant seeking to communicate with their former branch of government on behalf of a private
19 employer because such waivers should "be granted sparingly, and only in exigent
20 circumstances").

21 The Board has traditionally considered four factors when evaluating requests for post-
22 employment waivers: (1) the relationship of the City to the public servant's private employer; (2)
23 the benefits to the City (as opposed to the public servant) if the waiver were granted; (3) the

1 likelihood of harm to other organizations similar to, or in competition with, a public servant's
2 prospective employer if the waiver were granted; and (4) the extent to which the public servant
3 had unique skills or experience suited to the particular position that the prospective employer
4 would be hard-pressed to find in another person. See, e.g., A.O. No. 2012-2. In applying this
5 historic test, the Board determined that, when the former public servant's private employer was a
6 not-for-profit organization working in a public-private partnership with the City in which the
7 private employer and the City share an identity of interest, all four factors "need not be
8 satisfied." A.O. No. 2000-2 at 4; see A.O. No. 2008-4. The Board has further explained that, for
9 private employers that devote substantial private resources to support the work of a City agency
10 but which do not meet the standard of a public-private partnership, requests for waivers will "be
11 analyzed in light of [the private employer's] hybrid status." A.O. No. 2008-4 at 10.

12 Since 1991, the Board has grappled with articulating and applying a standard to requests
13 for waivers of the post-employment restrictions that would fulfill the objectives of the post-
14 employment restrictions while also addressing the needs of City agencies and the City's
15 changing relationship with not-for-profit partners. Over the course of these years, it has become
16 clear that in order to balance the City and personal interests at issue in requests for post-
17 employment waivers, the Board would benefit from the consideration of a more complete set of
18 circumstances. Proposed Board Rules §1-07(c)(1) codifies a new totality of the circumstances
19 standard for determining whether a waiver of the post-employment restrictions would conflict
20 with the purposes and interests of the City. As part of how the Board will evaluate the totality of
21 the circumstances, proposed Board Rules §1-07(c)(1) includes a non-exhaustive list of four
22 factors drawn from the Board's past deliberations on post-employment waivers.

1 **Proposed Board Rule § 1-07(c)(1)(i):** When a former public servant’s work for a private
2 employer involves furthering an interest identical to that of the City, there are diminished
3 concerns about a former public servant using their special access or knowledge to the detriment
4 of the City’s interests. Therefore, the Board has historically looked favorably upon requests for
5 waivers for former public servants who work for entities that the City controls or effectively
6 controls. See A.O. 2008-4 (observing that the Board would look favorably on requests to work
7 for City-affiliated not-for-profits when those entities were created by City agencies and had a
8 governing structure that involved public officials as officers and board members). Additionally,
9 the Board has historically granted waivers in situations where the former public servant’s private
10 employer operates as a public-private partnership with the City and devotes substantial private
11 resources to support the work of a City agency. See A.O. No. 2008-4 (stating that, “[w]hen the
12 City and [a private employer] share an ‘identity of interest,’ the City benefits from encouraging
13 former City employees to effectively remain in public service” by working for that private
14 employer); A.O. No. 1994-22 (granting a waiver for a public servant to take a position at a bio-
15 medical facility which operates as a joint venture between the City, the State, and a university).

16 **Proposed Board Rule § 1-07(c)(1)(ii):** When the former public servant is uniquely
17 suited to perform work that would benefit the City, rather than their private employer, the
18 proposed post-employment activities do not conflict with the purposes and interest of the City.
19 See A.O. No. 2012-2 (stating that, in evaluating a request for a waiver of the post-employment
20 restrictions, “the Board looks for a demonstration of the benefit *to the City*, not to the new
21 employer”) (emphasis in original). This capacity to benefit has been articulated in two ways:
22 either by virtue of the former public servant’s unique technical or professional expertise or
23 because at a small not-for-profit, there is no other employee able to do the prohibited work. See

1 A.O. No. 1992-17 (granting a public servant a waiver of the post-employment restrictions to
2 work for an entity when his expertise would help remedy contractual disputes between the entity
3 and the agency); A.O. No. 1994-19 (granting a waiver of Charter § 2604(d)(3) when a public
4 servant's proposed communications on behalf of a not-for-profit entity would primarily benefit
5 the City).

6 **Proposed Board Rule § 1-07(c)(1)(iii)**: Because public servants who have worked for
7 the City for brief periods of time are unlikely to have developed the connections necessary to
8 afford them undue influence or unfair access, the Board has granted requests for waivers on
9 behalf of these public servants more readily. See COIB Case No. 2019-463 (granting a waiver
10 for a public servant who worked for 40 days); COIB Case No. 2017-790 (granting a waiver for a
11 public servant who worked 36 days); COIB Case No. 2017-214 (granting a waiver for a public
12 servant who worked for 38 days); COIB Case No. 2015-646 (granting a waiver for a public
13 servant who worked for 40 days); COIB Case No. 2013-381 (granting a waiver for a former paid
14 summer intern); see also A.O. No. 2007-1 (granting a waiver for a former member of a
15 Community Education Council ("CEC"), a volunteer board composed of primarily of parents of
16 students in the district which has no executive or administrative powers or functions, no
17 involvement in contracts between vendors and their respective districts, and no power to
18 determine how districts spend funds, to appear before that CEC).

19 **Proposed Board Rule § 1-07(c)(1)(iv)**: A former public servant communicating with
20 their former agency on behalf of a private employer shortly after departing may pose a risk of
21 harm to firms similar to or in competition with that private employer given the former public
22 servant's familiarity with, and ability to navigate, the processes of their former agency. To
23 mitigate this risk, the Board would continue to disfavor requests in which the former public

1 servant proposes to communicate with units or divisions at the former agency with which he or
2 she worked regularly. See A.O. No. 1993-8 (stating that one of the purposes of the post-
3 employment restrictions was to prevent the exertion of special influence on government
4 decision-making by, among other things, preventing contact with former City colleagues on
5 behalf of a new employer); A.O. No. 1994-15 (granting a waiver of the one-year appearance
6 restriction for a public servant working for a unique not-for-profit created by New York State to
7 communicate with a unit of his former City agency other than the one for which he worked).
8 Additionally, the Board would continue to disfavor requests for waivers for former public
9 servants who seek to communicate with their former agencies to seek new business for their
10 private employers in the forms of licenses, permits, grants, or contracts. Compare A.O. No.
11 1992-17 (granting a waiver of the post-employment restrictions to a public servant when her
12 work at a private employer “would help remedy pending contractual disputes between the entity
13 and the agency”) with A.O. No. 1993-18 (declining to grant a waiver to a public servant whose
14 work at his private employer would focus, in part, on encouraging the participation of his private
15 employer’s clients in programs run by his former City agency); see also A.O. No. 1991-19
16 (prohibiting a public servant making an otherwise ministerial FOIL request from bypassing
17 normal procedures to contact individuals directly).

18 Additionally, in proposed Board Rules § 1-07(c)(2), the Board would provide two
19 procedural requirements for waivers of the post-employment restrictions. First, the Board would
20 decline to issue waivers when the ability of the Board to evaluate the request for a post-
21 employment waiver has been prejudiced by undue delay. The Board has emphasized this factor
22 to ensure that self-created exigencies do not overwhelm other relevant facts. See A.O. No. 2012-
23 2 (advising that request for waivers of the post-employment restrictions should be submitted in

1 advance of departure from City service); A.O. No. 1992-37 (noting with disapproval that a
2 former public servant did not request a waiver prior to having accepted the position with a
3 private employer). Second, the Board would decline to issue waivers when a former public
4 servant has, in the course of soliciting employment, violated Charter § 2604(d)(1), which
5 requires recusal from any particular matters involving a private employer while soliciting or
6 negotiating for a position with that employer. See A.O. No. 1992-37 (observing that a former
7 public servant's solicitation and negotiation for a position with a private employer that had
8 business dealings with her own agency raised the possibility that a violation of Charter Section
9 2604(d)(1) had occurred).

10 3. Consulting for a Former City Agency

11 As part of its experience applying the post-employment restrictions the Board has also
12 considered how those restrictions impact the City's ability to retain the expertise held by retiring
13 and departing City employees. The Board's approach to this issue has been informed by Charter
14 § 2604(d)(6), the so-called "government-to-government" exception, which provides that the
15 post-employment restrictions "shall not apply to positions with or representation on behalf of any
16 local, state or federal agency." Historically, the Board has determined that a City agency's
17 consulting agreement with a former employee falls within the government-to-government
18 exception when: (1) the former agency must have a pressing need for the former employee's
19 services, (2) the former agency must contract directly with the former employee, not through a
20 firm employing the former public servant, and (3) the contracting wage must be comparable to
21 that of the employee's salary at the time he or she left the agency. See A.O. Nos. 1993-12; 1995-
22 1. Proposed Board Rules § 1-07(d)(1) would provide a new set of five more specific and
23 detailed conditions which, if met, would permit a former public servant to be retained directly,

1 rather than through an employer, as a consultant by the City agency for which he or she worked
2 with the written approval of the agency head. Such written approval must then be provided to
3 the Board, which will post that information on its website.

4 The Board has also reviewed matters where, for reasons of administrative convenience, a
5 City agency seeks to employ a former employee as a consultant through an intermediary entity,
6 rather than directly as a consultant. This often arises when a City agency seeks to retain a public
7 servant as a consultant through a temporary staffing agency with which the agency already has a
8 staffing contract. In this case, because the former public servant would be an employee of the
9 temporary staffing agency or other intermediary entity, the “government-to-government”
10 exception of Charter § 2604(d)(6) would not apply. However, because in many circumstances
11 the consulting arrangement is motivated by the same City purpose that motivates direct
12 consulting arrangements, the Board has often issued waivers to public servants whose former
13 City agencies seek to employ them in this manner when it has determined there is no likelihood
14 that the intermediary entity may reap disproportionate benefits from the City agency’s need to
15 retain its former employee. See A.O. No. 1995-1 at 6. In proposed Board Rules § 1-07(d)(2) the
16 Board articulates a standard that such waivers must meet, incorporating the requirements of
17 proposed Board Rules § 1-07(d)(1), but also requiring that the intermediary entity is selected by
18 the City rather than by the public servant.

19

20 New material is underlined.

21 Section 1. Section 1-07 of Chapter 1 of Title 53 of the Rules of the City of New York is
22 REPEALED and a new Section 1-07 is added to read as follows:

23 §1-07 Post-Employment

1 (a) Post-Employment Appearances

2 (1) For the purposes of the restrictions in Charter § 2604(d) on appearances by a
3 former public servant before his or her former City agency, branch of City
4 government, or the City, such prohibited appearances include compensated
5 communications with any City board, commission, or other governmental entity
6 on which a representative of his or her former agency or branch of City
7 government sits by operation of law.

8 (2) The restrictions in Charter § 2604(d) on appearances by a former public servant
9 do not include appearances related to non-City matters.

10 (b) Date of Termination of City Service

11 (1) For purposes of Charter § 2604(d)(2), the date of termination of a former public
12 servant's City service is the last day such former public servant performed official
13 City duties or received benefits conditioned upon current City employment after
14 resigning, retiring, or being terminated.

15 (2) A former public servant who has served more than one City agency within one
16 year prior to the termination of such public servant's service with the City may
17 not appear before each such City agency for a period of one year after the
18 termination of service from each such agency.

19 (c) Waivers of the Post-Employment Restrictions

20 (1) In determining whether to issue a waiver pursuant to Charter § 2604(e) of the
21 post-employment restrictions of Charter § 2604(d) the Board will consider the
22 totality of the circumstances, including, but not limited to:

1 (i) whether the City shares an identity of interest with, or controls or
2 effectively controls, the former public servant's private employer:

3 (ii) whether the former public servant is uniquely suited to perform
4 work that would benefit the City because:

5 1. the private employer has no other employees able to engage in the
6 proposed appearances or work: or

7 2. the former public servant has rare technical or professional
8 expertise necessary to engage in the proposed appearances or
9 work;

10 (iii) whether the former public servant could not exercise undue
11 influence on government decision-making because they were only a public
12 servant for a short period of time; and

13 (iv) whether the former public servant's proposed appearances or work
14 does not pose a risk of harm to firms similar to, or in competition, with the
15 former public servant's private employer.

16 (2) The Board will not consider requests for waivers of Charter § 2604(d):

17 (i) made after undue delay: or

18 (ii) for former public servants who were not fully and formally recused
19 from all particular matters involving the private employer from the time of
20 soliciting or negotiating for employment with the private employer
21 through the termination of City service.

22 (d) Consulting for a Former City Agency

1 (1) Pursuant to Charter § 2604(d)(6), with the written approval of the agency head, a
2 former public servant may be directly retained by their former City agency as a
3 consultant within one year of the termination of their City service, and may work
4 on particular matters with which they were personally and substantially involved,
5 provided that:

6 (i) the consulting arrangement is made for the purpose of continuing
7 or completing work left unfinished by the former public servant at the time
8 their City service terminated, training their replacement, or filling a
9 vacancy until a replacement can be hired;

10 (ii) the consulting arrangement is no longer than reasonably necessary;

11 (iii) the former public servant has technical, professional, or other
12 subject-matter expertise or skills not otherwise available among the
13 agency's employees;

14 (iv) the compensation is comparable to what the former public servant
15 last earned at the agency; and

16 (v) within 30 days the written approval is disclosed to the Conflicts of
17 Interest Board and will be posted on the Board's website.

18 (2) A consulting arrangement between a City agency and a former public servant that
19 does not meet all the requirements of paragraph (1) of this subdivision is not
20 covered by Charter § 2604(d)(6) but a waiver may be sought for such a proposed
21 arrangement under Board Rules § 1-07(c).

22 (3) Pursuant to Charter § 2604(e), a consulting arrangement between a former public
23 servant and their former agency that meets the requirements of paragraph (1) of

1 this subdivision but in which the former public servant is retained through a
2 private firm for the administrative convenience of the City may be entered into if:

3 (i) the former public servant played in role in the recommendation or
4 selection of the private firm in his or her work as a public servant; and

5 (ii) after written approval of the head of the City agency, the Board
6 determines that the proposed consulting arrangement would provide a
7 benefit to the City distinct from the benefit to the former public servant or
8 to the private firm.

1 **New York City Conflicts of Interest Board**

2
3 **Notice of Public Hearing and Opportunity to Comment on Proposed Rules Regarding Post-**
4 **Employment Restrictions**

5
6 **What are we proposing?** The Conflicts of Interest Board is proposing to establish rules governing the
7 issuance of waivers of the post-employment restrictions and the definition of terms related to those
8 restrictions.

9
10 **When and where is the Hearing?** The Conflicts of Interest Board will hold a public hearing on the
11 proposed rule. The public hearing will take place at [time] on [date]. The hearing will be at [location].

12
13 This location has the following accessibility option(s) available: []

14
15 **How do I comment on the proposed rules?** Anyone can comment on the proposed rules by:

- 16
17 • **Website.** You can submit comments to the Conflicts of Interest Board through the NYC rules
18 website at <http://rules.cityofnewyork.us>.
19
20 • **Email.** You can email comments to Chad H. Gholizadeh at Rules@COIB.nyc.gov
21
22 • **Mail.** You can mail comments to Chad H. Gholizadeh, Assistant Counsel, Conflicts of Interest
23 Board, 2 Lafayette Street, Suite #1010, New York, New York 10007.
24
25 • **Fax.** You can fax comments to the Conflicts of Interest Board at (212) 437-0705.
26
27 • **By Speaking at the Hearing.** Anyone who wants to comment on the proposed rule at the public
28 hearing must sign up to speak. You can sign up before the hearing by calling (212) 437-xxxx. You
29 can also sign up in the hearing room before the hearing begins on [date]. You can speak for up to
30 three minutes.

31
32 **Is there a deadline to submit comments?** Yes, you must submit written comments by [date].

33
34 **Do you need assistance to participate in the hearing?** You must tell the Conflicts of Interest Board if
35 you need a reasonable accommodation of a disability at the hearing. You must tell us if you need a sign
36 language interpreter. You can tell us by mail at the address given above. You may also tell us by
37 telephone at (212) 437-0723. You must tell us by [date].

38
39 **Can I review the comments made on the proposed rules?** You can review the comments made
40 online on the proposed rules by going to the website at <http://rules.cityofnewyork.us/>. A few days after
41 the hearing, copies of all comments submitted online, copies of all written comments, and a summary of
42 oral comments concerning the proposed rule will be available to the public at the Conflicts of Interest
43 Board, 2 Lafayette Street, Suite #1010, New York, New York 10007.

44
45 **What authorizes the Conflicts of Interest Board to make this rule?** Sections 1043, 2603(a), and
46 2603(c)(4) of the City Charter authorize the Conflicts of Interest Board to make this proposed rule.

1

2 **Where can I find the Conflicts of Interest Board's rules?** The Conflicts of Interest Board's rules are
3 in Title 53 of the Rules of the City of New York.

4

5 **What rules govern the rulemaking process?** The Conflicts of Interest Board must meet the
6 requirements of Section 1043 of the City Charter when creating or changing rules. This notice is made
7 according to the requirements of Section 1043 of the City Charter.

8

9 **STATEMENT OF BASIS AND PURPOSE**

10 The post-employment restrictions of Chapter 68 of the City Charter, contained in
11 Charter § 2604(d), were primarily created to balance two competing City interests: the need to
12 recruit to public service talented individuals who may wish to return to or pursue private sector
13 employment, and the need to prevent public servants from trading on connections made in City
14 government service or using confidential City information for the benefit of themselves or future
15 employers. See Volume I, Report of the New York City Charter Revision Commission,
16 December 1986 – November 1988, at 28-29; see, e.g., Advisory Opinions (“A.O.”) Nos. 1993-11
17 at 6, 1993-12 at 4, 1994-15 at 11-12; 1996-1 at 7. Restrictions on the conduct of former public
18 servants pre-date the existence of the current Conflicts of Interest Board. See, e.g., A.O. No.
19 1989-1 (advising that the post-employment restrictions of the former Code of Ethics applied to
20 City employees who had resigned or retired, been terminated, or had been on discretionary
21 leaves of absence before the revised post-employment restrictions of the current Chapter 68
22 became effective); A.O. No. 1992-2 (advising a public servant, who had resigned before the
23 revised post-employment restrictions of the current Chapter 68 became effective, about the
24 applicability of the post-employment restrictions of the Code of Ethics).

25 Since 1989, the Board has issued 31 advisory opinions, totaling 210 pages, providing
26 guidance on the application of the post-employment restrictions set forth in Charter § 2604(d)
27 and on how the Board has considered requests for waivers of those restrictions. Because of the

1 limited scope and duration of the post-employment restrictions. requests for waivers of Charter §
2 2604(d) are never merely technical. and the Board has engaged in detailed review of the
3 competing interests at issue in each request. With the benefit of almost 30 years of experience in
4 evaluating requests for post-employment waivers, and in fulfillment of its Charter mandate under
5 Charter § 2603(c)(4) to determine which of its advisory opinions “has interpretative value in
6 construing provisions of this chapter,” the Board proposes to codify:

- 7 • Definitions of terms within Charter § 2604(d), such as “agency served” and
8 “termination of service.”
- 9 • A new “totality of the circumstances” standard with a non-exclusive list of four
10 factors, drawn from advisory opinions, the Board will consider in evaluating requests
11 for waivers of the post-employment restrictions.
- 12 • The standard, also from advisory opinions, for evaluating a unique type of post-
13 employment work: consulting for one’s former City agency, known as “consulting
14 back.”

15 The proposed rule addresses the following 25 advisory opinions:

16 A.O. No. 1989-1, A.O. No. 1991-8, A.O. No. 1991-19, A.O. No. 1992-2,
17 A.O. No. 1992-13, A.O. No. 1992-17, A.O. No. 1992-37, A.O. No. 1992-
18 38, A.O. No. 1993-11, A.O. No. 1993-12, A.O. No. 1993-18, A.O. No.
19 1993-30, A.O. No. 1994-15, A.O. No. 1994-19, A.O. No. 1994-22, A.O.
20 No. 1995-1, A.O. No. 1996-1, A.O. No. 1998-11, A.O. No. 2000-2, A.O.
21 No. 2007-1, A.O. No. 2008-1, A.O. No. 2008-4, A.O. No. 2009-5, A.O.
22 No. 2012-2, and A.O. No. 2019-1.

23 With the exception of the “consulting back” standard, the proposed rule does not address the
24 advisory opinions interpreting Charter § 2604(d)(6), which the Board reserves for the subject of
25 possible rulemaking in the future. See A.O. Nos. 1993-13, A.O. No. 1994-7, A.O. No. 1994-21,
26 A.O. No. 1997-1, and A.O. No. 1999-3. The Board has determined not to adopt A.O. No. 1992-
27 32, which applies only to the public servant who requested that advisory opinion.

1 **1. Definitions**

2 **a. Post-Employment Appearances**

3 Charter § 2604(d)(2) prohibits a former public servant from appearing before his or her
4 former City agency served for one year after leaving City service. Charter § 2603(d)(3) expands
5 this prohibition to the entire branch of City government served for former elected officials and
6 certain high-level former appointed public servants who have Citywide responsibilities. Charter
7 § 2604(d)(4) prohibits a former public servant from ~~“switching sides”~~ working on a the same
8 particular matter on which he or she worked in City service for the lifetime of that matter and
9 ~~expressly prohibits that public servant from making any appearances before and from~~
10 communicating with any City agency regarding that particular matter, including whether unpaid
11 ~~appearances or unpaid.~~ Therefore, to determine whether a particular communication is prohibited
12 by Charter § 2604(d), the Board must determine whether the communication is with the agency
13 or branch of government served by the former public servant or with the City; either because it is
14 with a governmental body on which an employee of that agency or branch of government sits or
15 because it is with an employee of that agency or branch of government who may not be acting in
16 his or governmental capacity.

17 Proposed Board Rules § 1-07(a)(1) would codify the Board’s long-standing interpretation
18 that the post-employment restrictions of Charter § 2604(d)(2), § 2604(d)(3), and § 2604(d)(4)
19 prohibit a former public servant from appearing before or communicating with any governmental
20 board or commission on which a representative of his or her former City agency, branch of City
21 government, or the City sits. For example, an employee of the New York City Department of
22 Housing Preservation and Development (“HPD”) would be prohibited by Charter § 2604(d)(2)
23 from appearing before the board of the New York City Housing Development Corporation

1 (“HDC”) within their first post-employment year because a representative of HPD sits on the
2 board of HDC. See A.O. No. 2008-1 (advising that when a public servant simultaneously holds
3 positions at multiple City agencies the post-employment appearance restriction of Charter §
4 2604(d)(2) applies to each position); see also COIB v. Sirefman, COIB Case No. 2007-847
5 (2009) (fining the former Interim President of the New York City Economic Development
6 Corporation (“EDC”) \$1,500 for appearing before the Hudson Yards Development Corporation
7 (“HYDC”) within one year of his resignation from EDC because the EDC President was present
8 at a meeting attended by the former Interim President in the EDC President’s capacity as an *ex-*
9 *officio* Member and Director of HYDC). By contrast, the former HPD employee would not be
10 prohibited from communicating with employees of HDC because that appearance is not before
11 the board on which their former agency’s representatives sit by operation of law.

12 Proposed Board Rules § 1-07(a)(2), would codify the Board’s interpretation that the
13 appearance and communication restrictions of Charter § 2604(d) exclude appearances and
14 communications related to non-City matters. In particular, the Board has advised public servants
15 that the following communications do not violate Charter § 2604(d): (1) social communications;
16 (2) efforts to solicit a public servant’s personal legal business or other types of personal services;
17 and (3) efforts to secure endorsements for a run for political office by a former public servant are
18 not prohibited by Charter § 2604(d). See A.O. No. 2009-5 (advising a former public servant that
19 the post-employment appearance restriction did not prohibit communication with a current
20 public servant in their private capacity, such as reaching out to perform personal legal work,
21 asking them to leave City employment to join the former public servant’s new ~~firm~~ firm, or to
22 solicit a political endorsement).

23 **b. Date of Termination of City Service**

1 To advise a public servant about the post-employment restrictions, the Board must
2 determine when the public servant's City service terminated. In proposed Board Rules § 1-
3 07(b)(1), the Board would incorporate the method of calculating the date of a public servant's
4 termination from City service set forth in A.O. Nos. 1998-11 and 2019-1, that is, the last day
5 such former public servant performed official City duties or received benefits conditioned upon
6 current City employment after resigning, retiring, or being terminated. The one-year appearance
7 prohibition of Charter § 2604(d)(2) would run from that date.

8 In proposed Board Rules § 1-07(b)(2), the Board would retain the substance of existing
9 Board Rules § 1-07 and would codify A.O. No. 2008-1 for public servants who serve multiple
10 City agencies. See also A.O. No. 1993-30 (providing advice on the tolling dates of the one-year
11 appearance restriction to a public servant who served two agencies in succession before leaving
12 City service). The proposed rule would clarify that a former public servant who has served more
13 than one City agency, concurrently or sequentially, is prohibited from appearing before each
14 such agency for one year after the termination of service, as determined by proposed Board
15 Rules § 1-07(b)(1), with each such agency.

16 **2. Otherwise Prohibited Conduct**

17 **a. Waivers of the Post-Employment Restrictions**

18 In contrast to the broad prohibitions against full-time public servants having ownership
19 interests in or positions at firms that do business with *any* City agency, for the vast majority of
20 public servants, the post-employment appearance restrictions apply *only* to a former public
21 servant's communications with their former employing City agency or branch of government and
22 *only* for one year after leaving City service; similarly, the lifetime post-employment particular
23 matter restriction applies only to a narrow set of matters (as defined in Charter § 2601(17)) on

1 which a former public servant worked personally and substantially while in City service. See,
2 e.g., A.O. No. 1992-38 (advising that a public servant was not prohibited from working on a
3 project where her involvement had been personal but not substantial). Because public servants
4 requesting waivers of the post-employment restrictions are seeking to engage in conduct in
5 which the relationships developed in their former City position may influence decision-making
6 by their former City agency, or ~~which~~ that may put them in a position to utilize their superior
7 familiarity with, and ability to navigate, the subtle culture of their former agency to achieve
8 preferential treatment for their private employer, or involve the exact particular matters on which
9 the former public servant personally and substantially worked while in City service, the Board
10 has analyzed requests for waivers of the post-employment restrictions differently from waivers
11 of other provisions of Chapter 68.

12 In evaluating the many requests for waivers it has received, the Board has sought to
13 balance adhering to the integrity of the post-employment restrictions of the Charter with the
14 asserted need for a particular former public servant to engage in otherwise prohibited conduct to
15 further an identified City interest. In A.O. No. 1991-8, the Board announced that it would issue
16 waivers of Chapter 68's post-employment restrictions "sparingly, and only in exigent cases."
17 A.O. No. 1991-8 at 2-3; see also A.O. No.1992-13 (declining to issue a waiver to a public
18 servant seeking to communicate with their former branch of government on behalf of a private
19 employer because such waivers should "be granted sparingly, and only in exigent
20 circumstances").

21 The Board has traditionally considered four factors when evaluating requests for post-
22 employment waivers: (1) the relationship of the City to the public servant's private employer; (2)
23 the benefits to the City (as opposed to the public servant) if the waiver were granted; (3) the

1 likelihood of harm to other organizations similar to, or in competition with, a public servant's
2 prospective employer if the waiver were granted; and (4) the extent to which the public servant
3 had unique skills or experience suited to the particular position that the prospective employer
4 would be hard-pressed to find in another person. See, e.g., A.O. No. 2012-2. In applying this
5 historic test, the Board ~~has~~ determined that, when the former public servant's private employer
6 was a not-for-profit organization working in a public-private partnership with the City in which
7 the private employer and the City share an identity of interest, all four factors "need not be
8 satisfied." A.O. No. 2000-2 at 4; see A.O. No. 2008-4. The Board has further explained that, for
9 private employers that devote substantial private resources to support the work of a City agency
10 but which do not meet the standard of a public-private partnership, requests for waivers will "be
11 analyzed in light of [the private employer's] hybrid status." A.O. No. 2008-4 at 10.

12 Since 1991, the Board has grappled with articulating and applying a standard to requests
13 for waivers of the post-employment restrictions that would fulfill the objectives of the post-
14 employment restrictions while also addressing the needs of City agencies and the City's
15 changing relationship with not-for-profit partners. Over the course of these years, it has become
16 clear that in order to balance the City and personal interests at issue in requests for post-
17 employment waivers, the Board would benefit from the consideration of a more complete set of
18 circumstances. Proposed Board Rules §1-07(c)(1) codifies a new totality of the circumstances
19 standard for determining whether a waiver of the post-employment restrictions would conflict
20 with the purposes and interests of the City. As part of how the Board will evaluate the totality of
21 the circumstances, proposed Board Rules §1-07(c)(1) includes a non-exhaustive list of four
22 factors drawn from the Board's past deliberations on post-employment waivers.

1 **Proposed Board Rule § 1-07(c)(1)(i):** When a former public servant’s work for a private
2 employer involves furthering an interest identical to that of the City, there are diminished
3 concerns about a former public servant using their special access or knowledge to the detriment
4 of the City’s interests. Therefore, the Board has historically looked favorably upon requests for
5 waivers for former public servants who work for entities that the City controls or effectively
6 controls. See A.O. 2008-4 (observing that the Board would look favorably on requests to work
7 for City-affiliated not-for-profits when those entities were created by City agencies and had a
8 governing structure that involved public officials as officers and board members). Additionally,
9 the Board has historically granted waivers in situations where the former public servant’s private
10 employer operates as a public-private partnership with the City and devotes substantial private
11 resources to support the work of a City agency. See A.O. No. 2008-4 (stating that, “[w]hen the
12 City and [a private employer] share an ‘identity of interest,’ the City benefits from encouraging
13 former City employees to effectively remain in public service” by working for that private
14 employer); A.O. No. 1994-22 (granting a waiver for a public servant to take a position at a bio-
15 medical facility which operates as a joint venture between the City, the State, and a university).

16 **Proposed Board Rule § 1-07(c)(21)(ii):** When the former public servant is uniquely
17 suited to perform work that would benefit the City, rather than their private employer, the
18 proposed post-employment activities do not conflict with the purposes and interest of the City.
19 See A.O. No. 2012-2 (stating that, in evaluating a request for a waiver of the post-employment
20 restrictions, “the Board looks for a demonstration of the benefit *to the City*, not to the new
21 employer”) (emphasis in original). This capacity to benefit has been articulated in two ways:
22 either by virtue of the former public servant’s unique technical or professional expertise or
23 because at a small not-for-profit, there is no other employee able to do the prohibited work. See

1 A.O. No. 1992-17 (granting a public servant a waiver of the post-employment restrictions to
2 work for an entity when his expertise would help remedy contractual disputes between the entity
3 and the agency); A.O. No. 1994-19 (granting a waiver of Charter § 2604(d)(3) when a public
4 servant's proposed communications on behalf of a not-for-profit entity would primarily benefit
5 the City).

6 **Proposed Board Rule § 1-07(c)(31)(iii)**: Because public servants who have worked for
7 the City for brief periods of time are unlikely to have developed the connections necessary to
8 afford them undue influence or unfair access, the Board has granted requests for waivers on
9 behalf of these public servants more readily. See COIB Case No. 2019-463 (granting a waiver
10 for a public servant who worked for 40 days); COIB Case No. 2017-790 (granting a waiver for a
11 public servant who worked 36 days); COIB Case No. 2017-214 (granting a waiver for a public
12 servant who worked for 38 days); COIB Case No. 2015-646 (granting a waiver for a public
13 servant who worked for 40 days); COIB Case No. 2013-381 (granting a waiver for a former paid
14 summer intern); see also A.O. No. 2007-1 (granting a waiver for a former member of a
15 Community Education Council ("CEC"), a volunteer board composed of primarily of parents of
16 students in the district which has no executive or administrative powers or functions, no
17 involvement in contracts between vendors and their respective districts, and no power to
18 determine how districts spend funds, to appear before that CEC).

19 **Proposed Board Rule § 1-07(c)(41)(iv)**: A former public servant communicating with
20 their former agency on behalf of a private employer shortly after departing may pose a risk of
21 harm to firms similar to or in competition with that private employer given the former public
22 servant's familiarity with, and ability to navigate, the processes of their former agency. To
23 mitigate this risk, the Board ~~has~~ would continue to disfavor requests in which the former

1 public servant proposes to communicate with units or divisions at the former agency with which
2 he or she worked regularly. See A.O. No. 1993-8 (stating that one of the purposes of the post-
3 employment restrictions was to prevent the exertion of special influence on government
4 decision-making by, among other things, preventing contact with former City colleagues on
5 behalf of a new employer); A.O. No. 1994-15 (granting a waiver of the one-year appearance
6 restriction for a public servant working for a unique not-for-profit created by New York State to
7 communicate with a unit of his former City agency other than the one for which he worked).
8 Additionally, the Board ~~has historically~~ would continue to disfavor requests for waivers for
9 former public servants who seek to communicate with their former agencies to seek new
10 business for their private employers in the forms of licenses, permits, grants, or contracts.
11 Compare A.O. No. 1992-17 (granting a waiver of the post-employment restrictions to a public
12 servant when her work at a private employer “would help remedy pending contractual disputes
13 between the entity and the agency”) with A.O. No. 1993-18 (declining to grant a waiver to a
14 public servant whose work at his private employer would focus, in part, on encouraging the
15 participation of his private employer’s clients in programs run by his former City agency); see
16 also A.O. No. 1991-19 (prohibiting a public servant making an otherwise ministerial FOIL
17 request from bypassing normal procedures to contact individuals directly).

18 Additionally, in proposed Board Rules § 1-07(c)(2), the Board would provide two
19 procedural requirements for waivers of the post-employment restrictions. First, the Board would
20 decline to issue waivers when the ability of the Board to evaluate the request for a post-
21 employment waiver has been prejudiced by undue delay. The Board has emphasized this factor
22 to ensure that self-created exigencies do not overwhelm other relevant facts. See A.O. No. 2012-
23 2 (advising that request for waivers of the post-employment restrictions should be submitted in

1 advance of departure from City service); A.O. No. 1992-37 (noting with disapproval that a
2 former public servant did not request a waiver prior to having accepted the position with a
3 private employer). Second, the Board would decline to issue waivers when a former public
4 servant has, in the course of soliciting employment, violated Charter § 2604(d)(1), which
5 requires recusal from any particular matters involving a private employer while soliciting or
6 negotiating for a position with that employer. See A.O. No. 1992-37 (observing that a former
7 public servant's solicitation and negotiation for a position with a private employer that had
8 business dealings with her own agency raised the possibility that a violation of Charter Section
9 2604(d)(1) had occurred).

10 23. Consulting for a Former City Agency

11 As part of its experience applying the post-employment restrictions the Board has also
12 considered how those restrictions impact the City's ability to retain the expertise held by retiring
13 and departing City employees. The Board's approach to this issue has been informed by Charter
14 § 2604(d)(6), the so-called "government-to-government" exception, which provides that the
15 post-employment restrictions "shall not apply to positions with or representation on behalf of any
16 local, state or federal agency." Historically, the Board has determined that a City agency's
17 consulting agreement with a former employee falls within the government-to-government
18 exception when: (1) the former agency must have a pressing need for the former employee's
19 services, (2) the former agency must contract directly with the former employee, not through a
20 firm employing the former public servant, and (3) the contracting wage must be comparable to
21 that of the employee's salary at the time he or she left the agency. See A.O. Nos. 1993-12; 1995-
22 1. Proposed Board Rules § 1-07(d)(1) would provide a new set of five more specific and
23 detailed conditions which, if met, would permit a former public servant to be retained directly,

1 rather than through an employer, as a consultant by the City agency for which he or she worked
2 with the written approval of the agency head. Such written approval must then be provided to
3 the Board, which will post that information on its website.

4 The Board has also reviewed matters where, for reasons of administrative convenience, a
5 City agency seeks to employ a former employee as a consultant through an intermediary entity,
6 rather than directly as a consultant. This often arises when a City agency seeks to retain a public
7 servant as a consultant through a temporary staffing agency with which the agency already has a
8 staffing contract. In this case, because the former public servant would be an employee of the
9 temporary staffing agency or other intermediary entity, the “government-to-government”
10 exception of Charter § 2604(d)(6) would not apply. However, because in many circumstances
11 the consulting arrangement is motivated by the same City purpose that motivates direct
12 consulting arrangements, the Board has often issued waivers to public servants whose former
13 City agencies seek to employ them in this manner when it has determined there is no likelihood
14 that the intermediary entity may reap disproportionate benefits from the City agency’s need to
15 retain its former employee. See A.O. No. 1995-1 at 6. In proposed Board Rules § 1-07(d)(2) the
16 Board articulates a standard that such waivers must meet, incorporating the requirements of
17 proposed Board Rules § 1-07(d)(1), but also requiring that the intermediary entity is selected by
18 the City rather than by the public servant.

19

20 New material is underlined.

21 Section 1. Section 1-07 of Chapter 1 of Title 53 of the Rules of the City of New York is
22 REPEALED and a new Section 1-07 is added to read as follows:

23 §1-07 Post-Employment

1 (a) Post-Employment Appearances

2 (1) For the purposes of the restrictions in Charter § 2604(d) on appearances by a
3 former public servant before his or her former City agency, branch of City
4 government, or the City, such prohibited appearances include compensated
5 communications with any City board, commission, or other governmental entity
6 on which a representative of his or her former agency or branch of City
7 government sits by operation of law.

8 (2) The restrictions in Charter § 2604(d) on appearances by a former public servant
9 do not include appearances related to non-City matters.

10 (b) Date of Termination of City Service

11 (1) For purposes of Charter § 2604(d)(2), the date of termination of a former public
12 servant's City service is the last day such former public servant performed official
13 City duties or received benefits conditioned upon current City employment after
14 resigning, retiring, or being terminated.

15 (2) A former public servant who has served more than one City agency within one
16 year prior to the termination of such public servant's service with the City may
17 not appear before each such City agency for a period of one year after the
18 termination of service from each such agency.

19 (c) Waivers of the Post-Employment Restrictions

20 (1) ~~Pursuant to Charter § 2604(e), In determining whether to issue a waiver pursuant~~
21 ~~to Charter § 2604(e) of the post-employment restrictions of Charter § 2604(d) the~~
22 ~~Board may waive the post-employment restrictions of Charter § 2604(d) if it~~
23 ~~determines that the proposed conduct does not conflict with the purposes and~~

1 interests of the City after will considering the totality of the circumstances,

2 including, but not limited to:

3 (i) whether the City shares an identity of interest with, or controls or
4 effectively controls, the former public servant's private employer:

5 (ii) whether the former public servant is uniquely placed-suited to
6 perform work that would benefit the City because:

7 1. the private employer has no other employees able to engage in the
8 proposed appearances or work; or

9 2. the former public servant has rare technical or professional
10 expertise necessary to engage in the proposed appearances or
11 work;

12 (iii) whether the former public servant could not exercise undue
13 influence on government decision-making because they were only a public
14 servant for a short period of time; and

15 (iv) ~~whether the former public servant's proposed appearances or work~~
16 ~~does not pose a risk of harm to firms similar to, or in competition, with the~~
17 ~~former public servant's private employer, because the proposed~~
18 ~~appearances or work involve:~~

19 ~~(v) new applications or requests to the City for licenses, permits,~~
20 ~~grants, or contracts; or~~

21 ~~(vi) units or divisions at the former public servant's agency with which~~
22 ~~the former public servant worked regularly.~~

23 (2) The Board will not consider requests for waivers of Charter § 2604(d):

- 1 (i) made by City agencies after undue delay; or
2 (ii) for former public servants who were not fully and formally recused
3 from all particular matters involving the private employer from the time of
4 soliciting or negotiating for employment with the private employer
5 through the termination of City service.

6 (d) Consulting for a Former City Agency

7 (1) Pursuant to Charter § 2604(d)(6), with the written approval of the agency head, a
8 former public servant may be directly retained by their former City agency as a
9 consultant within one year of the termination of their City service, and may work
10 on particular matters with which they were personally and substantially involved,
11 provided that:

- 12 (i) the consulting arrangement is made for the purpose of either
13 continuing or completing work left unfinished by the former public
14 servant at the time their City service terminated or, training their
15 replacement, or filling a vacancy until a replacement can be hired;
16 (ii) the consulting arrangement is no longer than reasonably necessary
17 to complete that unfinished work;
18 (iii) the former public servant has technical, professional, or other
19 subject-matter expertise or skills not otherwise available among the
20 agency's employees;
21 (iv) the compensation is comparable to what the former public servant
22 last earned at the agency; and

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

3 (2) A consulting arrangement between a City agency and a former public servant that
4 does not meet all the requirements of paragraph (1) of this subdivision is not
5 covered by Charter § 2604(d)(6) but a waiver may be sought for such a proposed
6 arrangement under Board Rules § 1-07(c).

7 ~~(2)(3)~~ Pursuant to Charter § 2604(e), a consulting arrangement between a former
8 public servant and their former agency that meets the requirements of paragraph
9 (1) of this subdivision but in which the former public servant is retained through a
10 private firm for the administrative convenience of the City may be entered into if:

11 (i) the private firm was selected by the City rather than by the former
12 public servant played in role in the recommendation or selection of the
13 private firm in his or her work as a public servant; and

14 (ii) after written approval of the head of the City agency, the Board
15 determines that the proposed consulting arrangement would provide a
16 benefit to the City distinct from the benefit to the former public servant or
17 to the private firm.