

July 14, 2020, Agenda – Open Meeting Matter

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: July 7, 2020

Re: Proposed Amendments to Board Rules § 1-07: Post-Employment

As directed by the Board at its March 2020 meeting, Staff formally submitted the proposed Rule codifying the Board's interpretation and application of Chapter 68's post-employment restrictions. On June 26, 2020, the Law Department and Mayor's Office of Operations provided their certifications to the proposed Rule after making a number of edits to the Statement of Basis and Purpose. .

Those edits, while extensive, focus on clarifying and simplifying the Statement of Basis and Purpose, with minimal substantive impact on the Rule. The Law Department and Mayor's Office of Operations revised the Statement of Basis and Purpose in the following ways:

- Streamlining the discussion of advisory opinions (Exh. 5 at 2, l.31 to 3, l.6; 10, l.20 to 11, l.11);
- Citing only the advisory opinions with substantive interpretations as incorporated into the proposed Rule (Exh. 5 at 4, ll.5-18);
- Deleting unnecessary sections that restate legal standards found in the Charter (Exh. 5 at 4, l.21 to 5, l.5);
- Explaining at greater length the Board's rationale for declining to grant requests for waivers made after undue delay (Exh. 5 at 12, ll.12-19); and
- Removing (because unhelpful and unnecessary) the phrase "by operation of law" from Proposed Board Rules § 1-07(a)(1) (Exh. 5 at 15, l.4).

If the Board approves the proposed rule as certified by the Law Department and the Mayor's Office of Operations, Staff will publish the proposed Rule in the City Record for public comment in advance of a public hearing, 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) Minutes of the March 2020 Open Meeting (**Exhibit 3**);
- 4) Draft Notice of Public Hearing and Opportunity to Comment (**Exhibit 4**); and
- 5) Draft Notice of Public Hearing and Opportunity to Comment, with changes tracked to the version approved at the March 2020 Open Meeting (**Exhibit 5**).

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

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

Date: March 26, 2020

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: None

The Board and Staff participated by videoconference pursuant to Executive Order No. 202 issued on March 7, 2020. 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 § 1-07; § 1-01(h); § 1-01(e)-(g); § 1-18; § 1-13; and §1-17.

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, p. 4, line 10: change “unpaid or unpaid” to “paid or unpaid”
- § 1-07(d)(2)(i): replace “in role” with “no role”

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 § 1-01(h)

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 § 1-01(e)-(g)

The Chair asked for any comments by the Board or Staff and upon motion duly made and seconded, the Board unanimously voted to continue discussions at a future open meeting.

Board Rules § 1-18

The Chair asked for any comments by the Board or Staff. The Board and Staff agreed to change the caption from “Endorsements” to “Use of City Title in Promotional Materials.”

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 §§ 1-13 and 1-17

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.

The open meeting was adjourned at approximately 10:02 a.m.

Respectfully submitted,

Julia H. Lee
Recording Secretary

New York City Conflicts of Interest Board

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

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

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 by videoconference at [time] on [date] and is accessible by:

- **Internet Video and Audio.** To access the hearing by Zoom, use the following URL: [].
- **Telephone.** To access the hearing by telephone, dial []. When prompted, use the following access code [] and password [].

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 Chad H. Gholizadeh at Rules@COIB.nyc.gov
- **By Speaking at the Hearing.** Anyone who wants to comment on the proposed rule at the public hearing may speak for up to three minutes. Please access the public hearing by internet video and audio or by telephone using the instructions above. It is recommended, but not required, that commenters sign up prior to the hearing by contacting the Conflicts of Interest Board by phone at (212) 437-0730 or by email at lee@coib.nyc.gov.

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

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, including if you need a sign language interpreter or simultaneous transcription. You can advise us by email at lee@coib.nyc.gov or by telephone at (212) 437-0730. You must tell us by [date].

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/>. 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 on the Conflicts of Interest Board's website(<https://www1.nyc.gov/site/coib/public-documents/open-meetings-and-public-hearings.page>) as soon as practicable.

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

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. The proposed rule was included in the agency's FY '21 Regulatory Agenda.

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), seek to balance two competing City interests:

(1) the need to recruit to public service talented individuals who may wish to return to or pursue private sector employment after their City service, and

(2) 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 also Advisory Opinions (“A.O.”) Nos. 1993-11 at 6, 1993-12 at 4, 1994-15 at 11-12, and 1996-1 at 7.

Since it was established in 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 limited scope and duration of the post-employment restrictions, requests for waivers of Charter § 2604(d) are never merely technical, and the Board has engaged in a detailed review of the competing interests at issue in each request. With the benefit of almost 30 years of

experience in evaluating requests for post-employment waivers, and in fulfillment of the mandate of Charter § 2603(c)(4) to determine which of its advisory opinions “has interpretative value in construing provisions of this chapter,” the Board proposes to codify:

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

The proposed rule addresses the following 22 advisory opinions:

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

Certain post-employment issues considered by the Board are not the subject of this rulemaking, specifically the advisory opinions interpreting Charter § 2604(d)(6), which the Board reserves for the subject of possible future rulemaking. See A.O. No. 1993-13, A.O. No. 1994-7, A.O. No. 1994-21, A.O. No. 1997-1, and A.O. No. 1999-3. The Board is not adopting A.O. Nos. 1989-1, 1992-2, 1992-32, and 2007-1, which apply only to the public servants who requested those opinions.

1. Definitions

a. Post-Employment Appearances

Proposed Board Rules § 1-07(a)(1) would codify the Board’s long-standing interpretation that Charter §§ 2604(d)(2), 2604(d)(3), and 2604(d)(4) prohibit a former public servant from appearing before or communicating with any City board or commission on which a representative of his or her former City agency, branch of City government, or the City serves. For example, an employee of the New York City Department of Housing Preservation and Development (“HPD”) would be prohibited by Charter § 2604(d)(2) from appearing before the board of the New York City Housing Development Corporation (“HDC”) within their first post-employment year because a representative of HPD sits on the board of HDC. See A.O. No. 2008-1 (advising that when a public servant simultaneously holds positions at multiple City agencies the post-employment appearance restriction of Charter § 2604(d)(2) applies to each position); see also COIB v. Sirefman, COIB Case No. 2007-847 (2009) (fining the former Interim President of the New York City Economic Development Corporation (“EDC”) \$1,500 for appearing before the Hudson Yards Development Corporation (“HYDC”) within one year of his resignation from EDC because the current EDC President was present at a meeting attended by the former Interim President in the EDC President’s capacity as an *ex-officio* Member and Director of HYDC). By contrast, a former HPD employee would not be prohibited from communicating with employees of HDC because that appearance is not before the board on which their former agency’s representatives sit.

Proposed Board Rules § 1-07(a)(2) would codify the Board’s interpretation that the appearance and communication restrictions of Charter § 2604(d) exclude appearances and communications related to non-City matters. In particular, the Board has advised public servants that the following communications are not prohibited by Charter § 2604(d): (1) social communications; (2) soliciting a public servant’s personal legal business or other types of personal services; and (3) seeking an endorsement for a run for political office. See A.O. No. 2009-5

(advising a former public servant that the post-employment appearance restriction did not prohibit communication with a current public servant in their private capacity, such as reaching out to perform personal legal work, asking them to leave City employment to join the former public servant's new firm, or soliciting a political endorsement).

b. Date of Termination of City Service

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

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

2. Otherwise Prohibited Conduct

a. Waivers of the Post-Employment Restrictions

In contrast to the broad prohibitions against full-time public servants having ownership interests in or positions at firms that do business with any City agency, for the vast majority of public servants, the post-employment appearance restrictions apply only to a former public servant's communications with their former employing City agency or branch of government and only for one year after leaving City service. Similarly, the lifetime post-employment particular matter restriction applies only to a narrow set of matters (as defined in Charter § 2601(17)) on which a former public servant worked personally and substantially while in City service. See, e.g., A.O. No. 1992-38 (advising that a public servant was not prohibited from working on a project where her involvement had been personal but not substantial).

However, because public servants requesting waivers of the post-employment restrictions are seeking to engage in conduct in which the relationships developed in their former City position may influence decision-making by their former City agency, or that may put them in a position to utilize their superior familiarity with, and ability to navigate, the subtle culture of their former agency to achieve preferential treatment for their private employer, or involve the exact particular matters on which the former public servant personally and substantially worked while in City service, the Board has analyzed requests for waivers of the post-employment restrictions differently from waivers of other provisions of Chapter 68.

In evaluating the many requests for waivers it has received, the Board has sought to balance adhering to the post-employment restrictions of the Charter with the asserted need for a particular former public servant to engage in otherwise prohibited conduct to further an identified City interest. In A.O. No. 1991-8, the Board announced that it would issue waivers of Chapter 68's post-employment restrictions "sparingly, and only in exigent cases." A.O. No. 1991-8 at 2-3; see

also A.O. No. 1992-13 (declining to issue a waiver to a public servant seeking to communicate with their former branch of government on behalf of a private employer).

The Board has traditionally considered four factors when evaluating requests for post-employment waivers:

- (1) the relationship between the City and the public servant's private employer;
- (2) the benefits to the City (as opposed to the public servant) if the waiver were granted;
- (3) the likelihood of harm to other organizations similar to, or in competition with, a public servant's prospective employer if the waiver were granted; and
- (4) the extent to which the public servant has unique skills or experience suited to the particular position that the prospective employer would be hard-pressed to find in another person (see, e.g., A.O. No. 2012-2).

In applying this long-utilized test, the Board has determined that, when the former public servant's private employer was a not-for-profit organization working in a public-private partnership with the City in which the private employer and the City share an identity of interest, all four factors "need not be satisfied." A.O. No. 2000-2 at 4; see A.O. No. 2008-4. The Board has further explained that, for private employers that devote substantial private resources to support the work of a City agency but which do not meet the standard of a public-private partnership, requests for waivers will "be analyzed in light of [the private employer's] hybrid status." A.O. No. 2008-4 at 10.

Since 1991, the Board has grappled with articulating and applying a standard to requests for waivers of the post-employment restrictions that would fulfill the objectives of the post-employment restrictions while also addressing the needs of City agencies and the City's changing relationship with not-for-profit partners. Over the course of these years, it has become clear that

the Board would benefit from the consideration of a more complete set of circumstances. Proposed Board Rules §1-07(c)(1) would codify a new “totality of the circumstances” standard for determining whether a waiver of the post-employment restrictions would conflict with the purposes and interests of the City. As part of how the Board would evaluate the totality of the circumstances, proposed Board Rules §1-07(c)(1) would include a non-exhaustive list of four factors drawn from the Board’s past deliberations on post-employment waivers.

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

Proposed Board Rule § 1-07(c)(1)(ii): When a former public servant is uniquely suited to perform work that would benefit the City, rather than their private employer, the proposed post-

employment activities do not conflict with the purposes and interest of the City. See A.O. No. 2012-2 (stating that, in evaluating a request for a waiver of the post-employment restrictions, “the Board looks for a demonstration of the benefit *to the City*, not to the new employer”) (emphasis in original). The potential benefit to the City has been articulated in two ways: either by virtue of the former public servant’s unique technical or professional expertise or because at a small not-for-profit, there is no other employee able to do the prohibited work. See A.O. No. 1992-17 (granting a public servant a waiver of the post-employment restrictions to work for an entity when his expertise would help remedy contractual disputes between the entity and the agency); A.O. No. 1994-19 (granting a waiver of Charter § 2604(d)(3) when a public servant’s proposed communications on behalf of a not-for-profit entity would primarily benefit the City).

Proposed Board Rule § 1-07(c)(1)(iii): Because public servants who have worked for the City for brief periods of time are less likely than those who served for extended periods of time in City government to have developed the type of connections that could afford them undue influence or unfair access, the Board has issued post-employment waivers for these public servants more readily. See COIB Case No. 2019-463 (40 days); COIB Case No. 2017-790 (36 days); COIB Case No. 2017-214 (38 days); COIB Case No. 2015-646 (40 days); COIB Case No. 2013-381 (granting a waiver for a former paid summer intern). Additionally, public servants whose City service was part-time on a consultative body have been granted post-employment waivers more frequently in light of the limited role they played in City government.

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

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

Additionally, in proposed Board Rules § 1-07(c)(2), the Board would establish two procedural requirements for waivers of the post-employment restrictions. First, the Board would decline to issue waivers when the request is made after undue delay. In considering such requests, the Board’s decision-making is hindered by a lack of time to evaluate the specific circumstances of the request as well as the complications that, in the Board’s experience, often accompany such requests, most commonly the former public servant having already accepted (or started) a job that

requires otherwise prohibited communications. The Board has emphasized this factor to ensure that self-created exigencies do not take precedence over other relevant factors. See A.O. No. 2012-2 (advising that request for waivers of the post-employment restrictions should be submitted in advance of departure from City service); A.O. No. 1992-37 (noting with disapproval that a former public servant did not request a waiver prior to having accepted the position with a private employer).

Second, the Board would decline to issue waivers when a former public servant has, in the course of soliciting employment, violated Charter § 2604(d)(1), which requires recusal from any particular matters involving a private employer while soliciting or negotiating for a position with that employer. See A.O. No. 1992-37 (observing that a former public servant's solicitation and negotiation for a position with a private employer that had business dealings with her own agency raised the possibility that a violation of Charter Section 2604(d)(1) had occurred).

3. Consulting for a Former City Agency

As part of its experience applying the post-employment restrictions, the Board has also considered how those restrictions impact the City's ability to retain the expertise held by retiring and departing City employees. The Board's approach to this issue has been informed by Charter § 2604(d)(6), the so-called "government-to-government" exception, which provides that the post-employment restrictions "shall not apply to positions with or representation on behalf of any local, state or federal agency." Historically, the Board has determined that a City agency's consulting agreement with a former employee falls within the government-to-government exception when: (1) the former agency has a pressing need for the former employee's services, (2) the former agency contracts directly with the former employee, not through a firm employing the former public servant, and (3) the contracting compensation is comparable to that of the employee's salary

at the time he or she left the agency. See A.O. Nos. 1993-12; 1995-1. Proposed Board Rules § 1-07(d)(1) would provide a new set of five more specific and detailed conditions which, if met, would permit a former public servant to be retained directly, rather than through an employer, as a consultant by the City agency for which he or she worked with the written approval of the agency head. Such written approval must then be provided to the Board, which will post that information on its website.

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

New material is underlined.

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

§1-07 Post-Employment

(a) Post-Employment Appearances

- (1) For the purposes of the restrictions set forth in Charter § 2604(d) on appearances by a former public servant before their former City agency or branch of City government, or the City, such prohibited appearances include compensated communications with any City board, commission, or other governmental entity on which a representative of their former agency or branch of City government sits.
- (2) The restrictions set forth in Charter § 2604(d) on appearances by a former public servant do not include appearances related to non-City matters.

(b) Date of Termination of City Service

- (1) For purposes of Charter § 2604(d)(2), the date of termination of a former public servant's City service is the last day such former public servant performed official City duties or received benefits conditioned upon current City employment after resigning, retiring, or being terminated.
- (2) A former public servant who has served more than one City agency within one year prior to the termination of such public servant's service with the City may not appear before each such City agency for a period of one year after the termination of service from each such agency.

(c) Waivers of the Post-Employment Restrictions

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

- (i) whether the City shares an identity of interest with, or controls or effectively controls, the former public servant's private employer;
- (ii) whether the former public servant is uniquely suited to perform work that would benefit the City because:
 - 1. the private employer has no other employees able to engage in the proposed appearances or work; or
 - 2. the former public servant has rare or unique technical or professional expertise necessary to engage in the proposed appearances or work;
- (iii) whether the former public servant is unlikely to exercise undue influence on government decision-making because they were a public servant for only a short period of time; and
- (iv) whether the former public servant's proposed appearances or work do not pose a risk of harm to firms similar to, or in competition, with the former public servant's private employer.

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

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

(d) Consulting for a Former City Agency

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

- (i) the consulting arrangement is made for the purpose of continuing or completing work left unfinished by the former public servant at the time their City service terminated, or for training their replacement, or for filling a vacancy until a replacement can be hired;
- (ii) the duration of the consulting arrangement is no longer than reasonably necessary;
- (iii) the former public servant has technical, professional, or other subject-matter expertise or skills not otherwise available among the agency's employees;
- (iv) the compensation is comparable to what the former public servant last earned at the agency; and
- (v) within 30 days the written approval of the agency head is disclosed to the Conflicts of Interest Board, which approval will be posted on the Board's website.

(2) Where a proposed consulting arrangement between a City agency and a former public servant does not meet all of the requirements set forth in paragraph (1) of

this subdivision and is therefore not covered by Charter § 2604(d)(6), a waiver may be sought for such a proposed arrangement pursuant to Board Rules § 1-07(c).

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

- (i) the former public servant played no role in the recommendation or selection of the private firm in his or her work as a public servant; and
- (ii) after receiving written approval of the head of the City agency, the Board determines that the proposed consulting arrangement would provide a benefit to the City distinct from the benefit to the former public servant or to the private firm.

**NEW YORK CITY LAW DEPARTMENT
DIVISION OF LEGAL COUNSEL
100 CHURCH STREET
NEW YORK, NY 10007
212-356-4028**

**CERTIFICATION PURSUANT TO
CHARTER §1043(d)**

RULE TITLE: Amendment of Rules Governing Post-Employment Restrictions

REFERENCE NUMBER: 2020 RG 036

RULEMAKING AGENCY: Conflicts of Interest Board

I certify that this office has reviewed the above-referenced proposed rule as required by section 1043(d) of the New York City Charter, and that the above-referenced proposed rule:

- (i) is drafted so as to accomplish the purpose of the authorizing provisions of law;
- (ii) is not in conflict with other applicable rules;
- (iii) to the extent practicable and appropriate, is narrowly drawn to achieve its stated purpose; and
- (iv) to the extent practicable and appropriate, contains a statement of basis and purpose that provides a clear explanation of the rule and the requirements imposed by the rule.

/s/ STEVEN GOULDEN
Acting Corporation Counsel

Date: June 25, 2020

NEW YORK CITY MAYOR'S OFFICE OF OPERATIONS

253 BROADWAY, 10th FLOOR

NEW YORK, NY 10007

212-788-1400

CERTIFICATION / ANALYSIS

PURSUANT TO CHARTER SECTION 1043(d)

RULE TITLE: Amendment of Rules Governing Post-Employment Restrictions

REFERENCE NUMBER: COIB-16

RULEMAKING AGENCY: Conflicts of Interest Board

I certify that this office has analyzed the proposed rule referenced above as required by Section 1043(d) of the New York City Charter, and that the proposed rule referenced above:

- (i) Is understandable and written in plain language for the discrete regulated community or communities;
- (ii) Minimizes compliance costs for the discrete regulated community or communities consistent with achieving the stated purpose of the rule; and
- (iii) Does not provide a cure period because it does not establish a violation, modification of a violation, or modification of the penalties associated with a violation.

/s/ Francisco X. Navarro

Mayor's Office of Operations

June 26, 2020

Date

New York City Conflicts of Interest Board

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

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

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 by videoconference at [time] on [date]. ~~The hearing will be at [location].~~ and is accessible by:

- ~~This location has~~ **Internet Video and Audio.** To access the hearing by Zoom, use the following accessibility option(s) available: [] URL: [].
- Telephone.** To access the hearing by telephone, dial []. When prompted, use the following access code [] and password [].

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 Chad H. Gholizadeh at Rules@COIB.nyc.gov
- ~~• Mail. You can mail comments to Chad H. Gholizadeh, Assistant 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-xxxx. You can also sign up in the hearing room before the hearing begins on [date].~~ You can speak for up to ~~three minutes.~~ may speak for up to three minutes. Please access the public hearing by internet video and audio or by telephone using the instructions above. It is recommended, but not required, that commenters sign up prior to the hearing by contacting the Conflicts of Interest Board by phone at (212) 437-0730 or by email at lee@coib.nyc.gov.

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

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,~~ including if you need a sign language interpreter, or simultaneous transcription. You can ~~tell~~ advise us by mail ~~email~~ at the ~~address given above.~~ lee@coib.nyc.gov or by telephone at (212) 437-~~0723~~0730. You must tell us by [date].

1
2 **Can I review the comments made on the proposed rules?** You can review the comments made online
3 on the proposed rules by going to the website at <http://rules.cityofnewyork.us/>. ~~A few days after the~~
4 ~~hearing, copies~~Copies of all comments submitted online, copies of all written comments, and a summary
5 of oral comments concerning the proposed rule will be available to the public ~~at the Conflicts of Interest~~
6 ~~Board, 2 Lafayette Street, Suite #1010, New York, New York 10007~~on the Conflicts of Interest Board's
7 ~~website~~(<https://www1.nyc.gov/site/coib/public-documents/open-meetings-and-public-hearings.page>) ~~as~~
8 ~~soon as practicable~~.

9
10 **What authorizes the Conflicts of Interest Board to make this rule?** Sections 1043, 2603(a), and
11 2603(c)(4) of the City Charter authorize the Conflicts of Interest Board to ~~make~~[promulgate](#) this proposed
12 rule.

13
14 **Where can I find the Conflicts of Interest Board's rules?** The Conflicts of Interest Board's rules are
15 in Title 53 of the Rules of the City of New York. ~~The proposed rule was included in the agency's FY '21~~
16 ~~Regulatory Agenda~~.

17
18 **What rules govern the rulemaking process?** The Conflicts of Interest Board must meet the
19 requirements of Section 1043 of the City Charter when creating or changing rules. This notice is made
20 according to the requirements of Section 1043 of the City Charter.

21

22 STATEMENT OF BASIS AND PURPOSE

23 The post-employment restrictions of Chapter 68 of the City Charter, contained in Charter
24 § 2604(d), ~~were primarily created~~[seek](#) to balance two competing City interests:

25 (1) the need to recruit to public service talented individuals who may wish to return to or
26 pursue private sector employment [after their City service](#), and

27 (2) the need to prevent public servants from trading on connections made in City
28 government service or using confidential City information for the benefit of themselves or future
29 employers.

30 See Volume I, Report of the New York City Charter Revision Commission, December
31 1986 – November 1988, at 28-29; ~~see, e.g., Advisory Opinions (“A.O.”) Nos. 1993-11 at 6, 1993-~~
32 ~~12 at 4, 1994-15 at 11-12; 1996-1 at 7. Restrictions on the conduct of former public servants pre-~~
33 ~~date the existence of the current Conflicts of Interest Board. See, e.g., A.O. No. 1989-1 (advising~~

1 ~~that the post-employment restrictions of the former Code of Ethics applied to City employees who~~
2 ~~had resigned or retired, been terminated, or had been on discretionary leaves of absence before the~~
3 ~~revised post-employment restrictions of the current Chapter 68 became effective); A.O. No. 1992-~~
4 ~~2 (advising a public servant, who had resigned before the revised post-employment restrictions of~~
5 ~~the current Chapter 68 became effective, about the applicability of the post-employment~~
6 ~~restrictions of the Code of Ethics).~~ also Advisory Opinions (“A.O.”) Nos. 1993-11 at 6, 1993-12
7 at 4, 1994-15 at 11-12, and 1996-1 at 7.

8 Since it was established in 1989, the Board has issued 31 advisory opinions, totaling 210
9 pages, providing guidance on the application of the post-employment restrictions set forth in
10 Charter § 2604(d) and on how the Board has considered requests for waivers of those restrictions.
11 Because of the limited scope and duration of the post-employment restrictions, requests for
12 waivers of Charter § 2604(d) are never merely technical, and the Board has engaged in a detailed
13 review of the competing interests at issue in each request. With the benefit of almost 30 years of
14 experience in evaluating requests for post-employment waivers, and in fulfillment of ~~its Charter~~the
15 mandate ~~under of~~ Charter § 2603(c)(4) to determine which of its advisory opinions “has
16 interpretative value in construing provisions of this chapter,” the Board proposes to codify:

- 17 • Definitions of terms within Charter § 2604(d), such as “agency served” and “termination
18 of service.”
- 19 • A new “totality of the circumstances” standard with a non-exclusive list of four factors,
20 drawn from advisory opinions, the Board will consider in when evaluating requests for
21 waivers of the post-employment restrictions.

- The standard, also drawn from advisory opinions, for evaluating a unique type of post-employment work: consulting for one’s former City agency, known as “consulting back.”

The proposed rule addresses the following 2522 advisory opinions:

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

~~With the exception of the “consulting back” standard, the proposed rule does not~~
~~address~~ Certain post-employment issues considered by the Board are not the subject of this
rulemaking, specifically the advisory opinions interpreting Charter § 2604(d)(6), which the Board
reserves for the subject of possible future rulemaking ~~in the future.~~ See A.O. No. 1993-13, A.O.
No. 1994-7, A.O. No. 1994-21, A.O. No. 1997-1, and A.O. No. 1999-3. ~~The Board has~~
~~determined~~ is not to adopt adopting A.O. ~~No.~~ Nos. 1989-1, 1992-2, 1992-32, and 2007-1, which
applies apply only to the public servant servants who requested ~~that advisory opinion~~ those opinions.

1. Definitions

a. Post-Employment Appearances

~~Charter § 2604(d)(2) prohibits a former public servant from appearing before his or her~~
~~former City agency served for one year after leaving City service. Charter § 2603(d)(3) expands~~
~~this prohibition to the entire branch of City government served for former elected officials and~~
~~certain high level former appointed public servants who have Citywide responsibilities. Charter~~
~~§ 2604(d)(4) prohibits a former public servant from working on the same particular matter on~~
~~which he or she worked in City service for the lifetime of that matter and from communicating~~
~~with any City agency regarding that particular matter, whether paid or unpaid. Therefore, to~~

1 ~~determine whether a particular communication is prohibited by Charter § 2604(d), the Board must~~
2 ~~determine whether the communication is with the agency or branch of government served by the~~
3 ~~former public servant or with the City; either because it is with a governmental body on which an~~
4 ~~employee of that agency or branch of government sits or because it is with an employee of that~~
5 ~~agency or branch of government who may not be acting in his or governmental capacity.~~

6 Proposed Board Rules § 1-07(a)(1) would codify the Board’s long-standing interpretation
7 that ~~the post-employment restrictions of~~ Charter §§ 2604(d)(2), § 2604(d)(3), and ~~§~~ 2604(d)(4)
8 prohibit a former public servant from appearing before or communicating with any
9 ~~governmental~~City board or commission on which a representative of his or her former City agency,
10 branch of City government, or the City ~~sits~~serves. For example, an employee of the New York
11 City Department of Housing Preservation and Development (“HPD”) would be prohibited by
12 Charter § 2604(d)(2) from appearing before the board of the New York City Housing Development
13 Corporation (“HDC”) within their first post-employment year because a representative of HPD
14 sits on the board of HDC. See A.O. No. 2008-1 (advising that when a public servant
15 simultaneously holds positions at multiple City agencies the post-employment appearance
16 restriction of Charter § 2604(d)(2) applies to each position); see also COIB v. Sirefman, COIB
17 Case No. 2007-847 (2009) (fining the former Interim President of the New York City Economic
18 Development Corporation (“EDC”) \$1,500 for appearing before the Hudson Yards Development
19 Corporation (“HYDC”) within one year of his resignation from EDC because the current EDC
20 President was present at a meeting attended by the former Interim President in the EDC President’s
21 capacity as an *ex-officio* Member and Director of HYDC). By contrast, ~~the~~a former HPD employee
22 would not be prohibited from communicating with employees of HDC because that appearance is
23 not before the board on which their former agency’s representatives sit ~~by operation of law.~~

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

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

13 To advise a public servant about the ~~post-employment restrictions, applicability of Charter~~
14 ~~§ 2604(d),~~ the Board must determine when the public servant's City service ~~terminated~~ended. In
15 proposed Board Rules § 1-07(b)(1), the Board would incorporate the method of calculating the
16 date of a public servant's termination from City service set forth in A.O. Nos. 1998-11 and 2019-
17 1;~~2~~ that is, the last day such former public servant performed official City duties or received benefits
18 conditioned upon current City employment after resigning, retiring, or being terminated. The one-
19 year appearance prohibition of Charter § 2604(d)(2) would run from that date.

20 In proposed Board Rules § 1-07(b)(2), the Board would retain the substance of existing
21 Board Rules § 1-07 and would codify A.O. No. 2008-1 for public servants who serve multiple City
22 agencies. See also A.O. No. 1993-30 (providing advice on the tolling dates of the one-year
23 appearance restriction to a public servant who served two agencies in succession before leaving

1 City service). The proposed rule would clarify that a former public servant who has served more
2 than one City agency, concurrently or sequentially, is prohibited from appearing before each such
3 agency for one year after the termination of service, as determined by proposed Board Rules § 1-
4 07(b)(1), with each such agency.

5 **2. Otherwise Prohibited Conduct**

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

7 In contrast to the broad prohibitions against full-time public servants having ownership
8 interests in or positions at firms that do business with any City agency, for the vast majority of
9 public servants, the post-employment appearance restrictions apply only to a former public
10 servant's communications with their former employing City agency or branch of government and
11 only for one year after leaving City service; ~~similarly.~~ Similarly, the lifetime post-employment
12 particular matter restriction applies only to a narrow set of matters (as defined in Charter §
13 2601(17)) on which a former public servant worked personally and substantially while in City
14 service. See, e.g., A.O. No. 1992-38 (advising that a public servant was not prohibited from
15 working on a project where her involvement had been personal but not substantial). Because

16 However, because public servants requesting waivers of the post-employment restrictions
17 are seeking to engage in conduct in which the relationships developed in their former City position
18 may influence decision-making by their former City agency, or that may put them in a position to
19 utilize their superior familiarity with, and ability to navigate, the subtle culture of their former
20 agency to achieve preferential treatment for their private employer, or involve the exact particular
21 matters on which the former public servant personally and substantially worked while in City
22 service, the Board has analyzed requests for waivers of the post-employment restrictions
23 differently from waivers of other provisions of Chapter 68.

1 In evaluating the many requests for waivers it has received, the Board has sought to balance
2 adhering to the ~~integrity of the~~ post-employment restrictions of the Charter with the asserted need
3 for a particular former public servant to engage in otherwise prohibited conduct to further an
4 identified City interest. In A.O. No. 1991-8, the Board announced that it would issue waivers of
5 Chapter 68's post-employment restrictions "sparingly, and only in exigent cases." A.O. No. 1991-
6 8 at 2-3; see also A.O. No. 1992-13 (declining to issue a waiver to a public servant seeking to
7 communicate with their former branch of government on behalf of a private employer ~~because~~
8 ~~such waivers should "be granted sparingly, and only in exigent circumstances").~~

9 The Board has traditionally considered four factors when evaluating requests for post-
10 employment waivers:

- 11 (1) the relationship ~~of between~~ the City ~~to and~~ the public servant's private employer;
- 12 (2) the benefits to the City (as opposed to the public servant) if the waiver were granted;
- 13 (3) the likelihood of harm to other organizations similar to, or in competition with, a public
14 servant's prospective employer if the waiver were granted; and
- 15 (4) the extent to which the public servant ~~had~~has unique skills or experience suited to the
16 particular position that the prospective employer would be hard-pressed to find in another person.
17 See (see, e.g., A.O. No. 2012-2).

18 In applying this ~~histori~~long-utilized test, the Board has determined that, when the former
19 public servant's private employer was a not-for-profit organization working in a public-private
20 partnership with the City in which the private employer and the City share an identity of interest,
21 all four factors "need not be satisfied." A.O. No. 2000-2 at 4; see A.O. No. 2008-4. The Board
22 has further explained that, for private employers that devote substantial private resources to
23 support the work of a City agency but which do not meet the standard of a public-private

1 partnership, requests for waivers will “be analyzed in light of [the private employer’s] hybrid
2 status.” A.O. No. 2008-4 at 10.

3 Since 1991, the Board has grappled with articulating and applying a standard to requests
4 for waivers of the post-employment restrictions that would fulfill the objectives of the post-
5 employment restrictions while also addressing the needs of City agencies and the City’s changing
6 relationship with not-for-profit partners. Over the course of these years, it has become clear that
7 ~~in order to balance the City and personal interests at issue in requests for post-employment waivers,~~
8 the Board would benefit from the consideration of a more complete set of circumstances. Proposed
9 Board Rules §1-07(c)(1) ~~codifies~~would codify a new “totality of the circumstances” standard for
10 determining whether a waiver of the post-employment restrictions would conflict with the
11 purposes and interests of the City. As part of how the Board ~~will~~would evaluate the totality of the
12 circumstances, proposed Board Rules §1-07(c)(1) ~~includes~~would include a non-exhaustive list of
13 four factors drawn from the Board’s past deliberations on post-employment waivers.

14 Proposed Board Rule § 1-07(c)(1)(i): When a former public servant’s work for a private
15 employer involves furthering an interest identical to that of the City, there are diminished concerns
16 about ~~asuch~~ former public servant using their special access or knowledge to the detriment of the
17 City’s interests. Therefore, the Board has historically ~~looked favorably upon~~been more likely to
18 grant requests for waivers for former public servants who work for entities that the City controls
19 or effectively controls. See A.O. 2008-4 (observing that the Board would look favorably ~~on~~upon
20 requests to work for City-affiliated not-for-profits when those entities were created by City
21 agencies and had a governing structure that involved public officials as officers ~~and/or~~ board
22 members). Additionally, in the past the Board has ~~historically~~ granted waivers in situations where
23 the former public servant’s private employer operates as a public-private partnership with the City

1 and devotes substantial private resources to support the work of a City agency. See A.O. No.
2 2008-4 (stating that, “[w]hen the City and [a private employer] share an ‘identity of interest,’ the
3 City benefits from encouraging former City employees to effectively remain in public service” by
4 working for that private employer); A.O. No. 1994-22 (granting a waiver for a public servant to
5 take a position at a bio-medical facility which ~~operates~~operated as a joint venture between the City,
6 the State, and a university).

7 Proposed Board Rule § 1-07(c)(1)(ii): When ~~thea~~ former public servant is uniquely suited
8 to perform work that would benefit the City, rather than their private employer, the proposed post-
9 employment activities do not conflict with the purposes and interest of the City. See A.O. No.
10 2012-2 (stating that, in evaluating a request for a waiver of the post-employment restrictions, “the
11 Board looks for a demonstration of the benefit *to the City*, not to the new employer”) (emphasis in
12 original). ~~This capacity to~~The potential benefit to the City has been articulated in two ways: either
13 by virtue of the former public servant’s unique technical or professional expertise or because at a
14 small not-for-profit, there is no other employee able to do the prohibited work. See A.O. No. 1992-
15 17 (granting a public servant a waiver of the post-employment restrictions to work for an entity
16 when his expertise would help remedy contractual disputes between the entity and the agency);
17 A.O. No. 1994-19 (granting a waiver of Charter § 2604(d)(3) when a public servant’s proposed
18 communications on behalf of a not-for-profit entity would primarily benefit the City).

19 Proposed Board Rule § 1-07(c)(1)(iii): Because public servants who have worked for the
20 City for brief periods of time are ~~unlikely~~less likely than those who served for extended periods of
21 time in City government to have developed the type of connections ~~necessary to that could~~ afford
22 them undue influence or unfair access, the Board has ~~granted requests for issued post-employment~~
23 waivers ~~on behalf of for~~ these public servants more readily. See COIB Case No. 2019-463

1 ~~(granting a waiver for a public servant who worked for~~ 40 days); COIB Case No. 2017-790
2 ~~(granting a waiver for a public servant who worked~~ 36 days); COIB Case No. 2017-214 ~~(granting~~
3 ~~a waiver for a public servant who worked for~~ 38 days); COIB Case No. 2015-646 ~~(granting a~~
4 ~~waiver for a public servant who worked for~~ 40 days); COIB Case No. 2013-381 (granting a waiver
5 for a former paid summer intern); see also A.O. No. 2007-1 (granting a waiver for a former member
6 of a Community Education Council (“CEC”), a volunteer board composed). Additionally, public
7 servants whose City service was part-time on a consultative body have been granted post-
8 employment waivers more frequently in light of ~~primarily of parents of students in the district~~
9 ~~which has no executive or administrative powers or functions, no involvement in contracts~~
10 ~~between vendors and their respective districts, and no power to determine how districts spend~~
11 ~~funds, to appear before that CEC).~~ limited role they played in City government.

12 Proposed Board Rule § 1-07(c)(1)(iv): A former public servant communicating with their
13 former agency on behalf of a private employer shortly after departing may pose a risk of harm to
14 firms similar to or in competition with that private employer, given the former public servant’s
15 familiarity with, and ability to navigate, the processes of their former agency. To mitigate this
16 risk, the Board would continue to disfavor requests in which the former public servant proposes to
17 communicate with units or divisions at the former agency with which he or she worked regularly.
18 See A.O. No. 1993-8 (stating that one of the purposes of the post-employment restrictions was to
19 prevent the exertion of special influence on government decision-making by, among other things,
20 preventing contact with former City colleagues on behalf of a new employer); A.O. No. 1994-15
21 (granting a waiver of the one-year appearance restriction for a public servant working for a unique
22 not-for-profit created by New York State to communicate with a unit of his former City agency
23 other than the one for which he worked). Additionally, the Board would continue to disfavor

1 requests for waivers for former public servants who ~~seek~~wish to communicate with their former
2 agencies to seek new business for their private employers in the forms of licenses, permits, grants,
3 or contracts. Compare A.O. No. 1992-17 (granting a waiver of the post-employment restrictions
4 to a public servant when her work at a private employer “would help remedy pending contractual
5 disputes between the entity and the agency”) with A.O. No. 1993-18 (declining to grant a waiver
6 to a public servant whose work at his private employer would focus, in part, on encouraging the
7 participation of his private employer’s clients in programs run by his former City agency); see also
8 A.O. No. 1991-19 (prohibiting a public servant making an otherwise ministerial FOIL request from
9 bypassing normal procedures to contact individuals directly).

10 Additionally, in proposed Board Rules § 1-07(c)(2), the Board would ~~provide~~establish two
11 procedural requirements for waivers of the post-employment restrictions. First, the Board would
12 decline to issue waivers when the ~~ability of the Board to evaluate the request for a post-~~
13 ~~employment waiver has been prejudiced by~~ is made after undue delay. In considering such
14 requests, the Board’s decision-making is hindered by a lack of time to evaluate the specific
15 circumstances of the request as well as the complications that, in the Board’s experience, often
16 accompany such requests, most commonly the former public servant having already accepted (or
17 started) a job that requires otherwise prohibited communications. The Board has emphasized this
18 factor to ensure that self-created exigencies do not ~~overwhelm~~take precedence over other relevant
19 ~~facts~~factors. See A.O. No. 2012-2 (advising that request for waivers of the post-employment
20 restrictions should be submitted in advance of departure from City service); A.O. No. 1992-37
21 (noting with disapproval that a former public servant did not request a waiver prior to having
22 accepted the position with a private employer).

1 Second, the Board would decline to issue waivers when a former public servant has, in the
2 course of soliciting employment, violated Charter § 2604(d)(1), which requires recusal from any
3 particular matters involving a private employer while soliciting or negotiating for a position with
4 that employer. See A.O. No. 1992-37 (observing that a former public servant's solicitation and
5 negotiation for a position with a private employer that had business dealings with her own agency
6 raised the possibility that a violation of Charter Section 2604(d)(1) had occurred).

7 **3. Consulting for a Former City Agency**

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

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

16
17 New material is underlined.

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

20 §1-07 Post-Employment

21 (a) Post-Employment Appearances

22 (1) For the purposes of the restrictions ~~set forth~~ in Charter § 2604(d) on appearances
23 by a former public servant before ~~his or her~~their former City agency, or branch of

1 City government, or the City, such prohibited appearances include compensated
2 communications with any City board, commission, or other governmental entity on
3 which a representative of ~~his or her~~their former agency or branch of City
4 government sits ~~by operation of law~~.

5 (2) The restrictions ~~set forth~~ in Charter § 2604(d) on appearances by a former public
6 servant do not include appearances related to non-City matters.

7 (b) Date of Termination of City Service

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

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

16 (c) Waivers of the Post-Employment Restrictions

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

20 (i) whether the City shares an identity of interest with, or controls or
21 effectively controls, the former public servant's private employer;

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

- 1 1. the private employer has no other employees able to engage in the
2 proposed appearances or work; or
- 3 2. the former public servant has rare ~~or unique~~ technical or professional
4 expertise necessary to engage in the proposed appearances or work;
- 5 (iii) whether the former public servant ~~could not~~ is unlikely to exercise
6 undue influence on government decision-making because they were ~~only~~ a
7 public servant for ~~only~~ a short period of time; and
- 8 (iv) whether the former public servant's proposed appearances or work
9 ~~does~~ not pose a risk of harm to firms similar to, or in competition, with
10 the former public servant's private employer.

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

- 12 (i) made after undue delay; or
- 13 (ii) for former public servants who were not fully and formally recused
14 from all particular matters involving the private employer from the time of
15 soliciting or negotiating for employment with the private employer through
16 the termination of ~~their~~ City service.

17 (d) Consulting for a Former City Agency

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

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

5 (ii) the duration of the consulting arrangement is no longer than
6 reasonably necessary;

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

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

12 (v) within 30 days the written approval of the agency head is disclosed
13 to the Conflicts of Interest Board and, which approval will be posted on the
14 Board's website.

15 (2) A-Where a proposed consulting arrangement between a City agency and a former
16 public servant that does not meet all of the requirements of set forth in paragraph
17 (1) of this subdivision and is therefore not covered by Charter § 2604(d)(6), but a
18 waiver may be sought for such a proposed arrangement underpursuant to Board
19 Rules § 1-07(c).

20 (3) Pursuant to Charter § 2604(e), a consulting arrangement between a former public
21 servant and their former agency that meets the requirements of paragraph (1) of this
22 subdivision but inunder which the former public servant is retained through a
23 private firm for the administrative convenience of the City may be entered into if:

1 (i) the former public servant played no role in the recommendation or
2 selection of the private firm in his or her work as a public servant; and
3 (ii) after receiving written approval of the head of the City agency, the
4 Board determines that the proposed consulting arrangement would provide
5 a benefit to the City distinct from the benefit to the former public servant or
6 to the private firm.

NEW YORK CITY LAW DEPARTMENT
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212-356-4028

CERTIFICATION PURSUANT TO
CHARTER §1043(d)

RULE TITLE: Amendment of Rules Governing Post-Employment Restrictions

REFERENCE NUMBER: 2020 RG 036

RULEMAKING AGENCY: Conflicts of Interest Board

I certify that this office has reviewed the above-referenced proposed rule as required by section 1043(d) of the New York City Charter, and that the above-referenced proposed rule:

- (i) is drafted so as to accomplish the purpose of the authorizing provisions of law;
- (ii) is not in conflict with other applicable rules;
- (iii) to the extent practicable and appropriate, is narrowly drawn to achieve its stated purpose; and
- (iv) to the extent practicable and appropriate, contains a statement of basis and purpose that provides a clear explanation of the rule and the requirements imposed by the rule.

/s/ STEVEN GOULDEN
Acting Corporation Counsel

Date: June 25, 2020

NEW YORK CITY MAYOR'S OFFICE OF OPERATIONS

253 BROADWAY, 10th FLOOR

NEW YORK, NY 10007

212-788-1400

CERTIFICATION / ANALYSIS

PURSUANT TO CHARTER SECTION 1043(d)

RULE TITLE: Amendment of Rules Governing Post-Employment Restrictions

REFERENCE NUMBER: COIB-16

RULEMAKING AGENCY: Conflicts of Interest Board

I certify that this office has analyzed the proposed rule referenced above as required by Section 1043(d) of the New York City Charter, and that the proposed rule referenced above:

(i) Is understandable and written in plain language for the discrete regulated community or communities;

(ii) Minimizes compliance costs for the discrete regulated community or communities consistent with achieving the stated purpose of the rule; and

(iii) Does not provide a cure period because it does not establish a violation, modification of a violation, or modification of the penalties associated with a violation.

/s/ Francisco X. Navarro

June 26, 2020

Mayor's Office of Operations

Date