

## New York City Conflicts of Interest Board

### **Notice of Public Hearing and Opportunity to Comment on Proposed Rule Regarding Official Fundraising**

**What are we proposing?** The Conflicts of Interest Board proposes to amend its rules to codify the circumstances by which public servants may use City time, City resources, and their City positions to fundraise to benefit the City or not-for-profit organizations.

**When and where is the hearing?** The Conflicts of Interest Board will hold a public hearing on the proposed rule. The public hearing will take place at 3:30 p.m. on Wednesday, April 24, 2019, at Spector Hall, 22 Reade Street, New York, New York 10007.

This location has the following accessibility option(s) available: Wheelchair Accessible.

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

- **Website.** You can submit comments to the Conflicts of Interest Board through the NYC rules website at <http://rules.cityofnewyork.us>.
- **Email.** You can email comments to [rules@coib.nyc.gov](mailto:rules@coib.nyc.gov).
- **Mail.** You can mail comments to Christopher M. Hammer, Deputy General Counsel, Conflicts of Interest Board, 2 Lafayette Street, Suite 1010, New York, New York 10007.
- **Fax.** You can fax comments to the Conflicts of Interest Board at (212) 437-0705.
- **By speaking at the hearing.** Anyone who wants to comment on the proposed rule at the public hearing must sign up to speak. You can sign up before the hearing by calling (212) 437-0730. You can also sign up in the hearing room before the hearing begins on Wednesday, April 24, 2019. You can speak for up to three minutes.

**Is there a deadline to submit comments?** Yes; you must submit written comments by Tuesday, April 23, 2019.

**Do you need assistance to participate in the hearing?** You must tell the Conflicts of Interest Board if you need a reasonable accommodation of a disability at the hearing. You must tell us if you need a sign language interpreter. You can tell us by mail at the address given above. You may also tell us by telephone at (212) 437-0730. You must tell us by Monday, April 22, 2019.

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

**What authorizes the Conflicts of Interest Board to make this rule?** Sections 1043, 2603(a), and 2606(d) of the City Charter authorize the Conflicts of Interest Board to make this proposed rule. This proposed rule was not included in the Conflicts of Interest Board's regulatory agenda for this Fiscal Year because it was not contemplated when the Conflicts of Interest Board published the agenda.

**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 of the Proposed Rule**

The proposed rule reflects and reaffirms a principle the Board has long held: the City benefits from private donations to City agencies or to not-for-profit organizations serving the City. The Board seeks to encourage this philanthropy because it is beneficial to the City and its residents, particularly at times when City government faces budget challenges that affect its ability to provide programs and services to its residents. Thus, when public servants request the Board's advice regarding whether Chapter 68 permits them to solicit contributions from private donors, the Board has consistently recognized the City purpose in a public servant using City time, City resources, and his or her City position to solicit contributions for programs and services that benefit New Yorkers.

This City purpose must, however, be weighed against the potentially coercive effect of a public servant's solicitations, as well as any private interests that a public servant may have in making such solicitations. Setting this balance is essential to the Board's mission, articulated in Charter § 2600, "to preserve the trust placed in the public servants of the city, to promote public confidence in government, to protect the integrity of government decision-making and to enhance government efficiency."

The proposed rule represents the synthesis of decades of advice the Board has provided to public servants regarding the solicitation of donations to fund programs and services of City government or of not-for-profit organizations that serve New Yorkers. The Board’s numerous advisory opinions on this topic include Advisory Opinion Nos. 1991-10, 1992-15, 1992-21, 1992-27, 1993-15, 1993-26, 1994-29, 1995-5, 1995-7, 1995-27, 1998-14, 2003-4, and 2008-6. Most notably among these prior advisory opinions, the Board in Advisory Opinion No. 2003-4 articulated a comprehensive framework to permit a City agency’s employees to solicit funds for the City and for not-for-profit organizations closely affiliated with the agency.

Since then, the New York City Council enacted Local Law No. 181 of 2016, codified in Chapter 9 of Title 3 of the New York City Administrative Code (“Chapter 9”). Among other things, Chapter 9 requires a not-for-profit organization affiliated with elected officials, either directly or through their agents (such as commissioners of City agencies with respect to the Mayor), to report certain of its donations to the Board on an annual basis.

The proposed rule interprets the “catch-all” provision of Charter § 2604(b)(2), which states that “[n]o public servant shall engage in any business, transaction, or private employment, or have any financial or other private interest, direct or indirect, which is in conflict with the proper discharge of his or her official duties.” This provision was included by the drafters of the comprehensively amended Chapter 68 “in recognition of the fact that the specific prohibitions set forth in [Chapter 68] cannot address all conflict of interest situations which may arise in the future and that the [Conflicts of Interest] Board must retain the flexibility to handle new situations as they arise.” Volume II, Report of the New York City Charter Revision Commission, December 1986 – November 1988, at 175.

The proposed rule would codify the conditions under which a public servant may solicit donations. Specifically, it would identify: (1) the entities for which a public servant may solicit donations; (2) the persons or entities from whom a public servant may solicit donations; (3) the disclaimer a public servant must make in connection with the solicitation; and (4) the disclosures a City agency must make about its fundraising activities.

### **1) For Whom a Public Servant May Solicit Donations**

Paragraph (a)(1) of Board Rules § 1-14 would identify potential beneficiaries of a public servant's solicitations. Because "[i]t is of course clear that the City itself is a permissible beneficiary," A.O. No. 2003-4 at 2, a public servant could solicit donations for his or her City agency or office, as well as for any other City agency or office the public servant's agency head designates after obtaining the written approval of the head of the other agency or office. Some not-for-profit organizations are closely affiliated with an agency or office by virtue of an agency head exercising control over the organization as part of his or her City position. These organizations, which include entities such as the Fund for Public Schools (affiliated with the New York City Department of Education) and the Fund for Public Health in New York City (affiliated with the New York City Department of Health and Mental Hygiene), are regulated by Chapter 9 precisely because they are affiliated with elected officials or their agents. Thus, the proposed rule would recognize that, where an agency head exercises control over an organization subject to Chapter 9 as part of his or her City job, fundraising for the organization by that office or agency's employees may occur as if such fundraising were for the City itself.

Finally, a public servant may solicit donations for the benefit of any other not-for-profit organization designated by the public servant's agency head pursuant to paragraph (b), that is, not-for-profit organizations that have a clear and direct nexus with the City and its residents and

with the mission or duties of the City agency or office. As the Board has previously observed in Advisory Opinion No. 2008-6 in the context of solicitations for unaffiliated not-for-profit organizations, an arts organization in California or an affordable housing provider in Buffalo would not be permissible beneficiaries pursuant to paragraph (b). See A.O. No. 2008-6 at 7. Similarly, a not-for-profit organization dedicated to increasing affordable housing in the City might well be an appropriate beneficiary of fundraising by some agencies, such as the New York City Department of Housing Preservation and Development, but not by other agencies, such as the New York City Department of Cultural Affairs. Id.

Subparagraph (a)(1)(iv) and subdivision (b) would reflect the prohibition set forth in Charter § 2604(b)(3) that a public servant may not “shall use or attempt to use his or her position as a public servant to obtain any financial gain, contract, license, privilege or other private or personal advantage, direct or indirect, for the public servant or any person or firm associated with the public servant.” Thus, paragraph (b) would state that an agency head may not designate an organization as an appropriate beneficiary of agency solicitations if the agency head is “associated,” within the meaning of Charter § 2601(5), with the organization or an employee of the organization. Similarly, even if a public servant’s agency head has designated an organization as the appropriate beneficiary of agency solicitations, subparagraph (a)(1)(iv) would provide that a public servant could not solicit donations to that organization if the public servant is associated, within the meaning of Charter § 2601(5), with the organization or an employee of the organization.

## **2) From Whom a Public Servant May Solicit Donations**

Paragraph (a)(2) would permit a public servant to solicit donations when such solicitations are directed to the general public, such as in a public service advertisement, a

speech, a flyer, a robo-call, or a mass mailing. As the Board has previously observed, when solicitations are directed to the general public, “there is less danger that any particular person or entity will receive, or be perceived to receive, preferential treatment as a result of a donation,” and “since [the solicitation] is not directed at any particular individual or entity, the danger of coercion is virtually nil.” A.O. No. 2003-4 at 17-18. Indeed, paragraph (a)(2) recognizes that this slight risk of coercion “is outweighed by the public benefit derived from permitting such solicitations.” Id. at 19.

Solicitations directed toward a specific individual or firm—such as one-on-one phone calls, meetings, and personal letters—“are effective precisely *because* they are inherently coercive.” A.O. No. 2003-4 at 19. In recognition of this, paragraph (a)(2) would permit a public servant to direct a solicitation to an individual or firm provided that the individual or firm does not have a “particular matter” pending before the public servant, as defined in Charter § 2601(17). By prohibiting solicitations to those individuals who or firms that have a particular matter pending before the soliciting public servant, the proposed rule would balance the benefit to the City of the solicitations while “minimiz[ing] the likelihood of coercion and the appearance that the donor may receive inappropriate access or other preferential treatment as a result of the donation.” A.O. No. 2003-4 at 20. This prohibition on solicitations would be limited to the soliciting official; thus, an agency could erect firewalls that prevent a soliciting official from having any involvement in making, affecting, or directing the particular matter.

### **3) What Disclaimer a Public Servant Must Make in Connection with the Solicitation**

Paragraph (a)(3) would require a public servant to accompany any solicitation with a disclaimer that a contribution will not affect the disposition of any business dealings with the

City or provide special access to City officials. This requirement would mitigate the likelihood of coercion and the appearance that a donor may receive preferential treatment.

#### **4) What Disclosures a City Agency Must Make about its Fundraising Activities**

Subdivision (c) would codify reporting requirements for an agency's fundraising activities, which would provide an additional safeguard to ensure that City agencies' fundraising activities are legally compliant. The agency head would be required to report information to the Board regarding donations of \$5,000 or more received by the agency during the previous calendar year, as well as the name of any not-for-profit organization, designated pursuant to paragraph (b), for which agency employees solicited donations.

A City agency would be required to report donations of \$5,000 or more the agency received. In selecting this threshold, the Board would be codifying the threshold articulated in A.O. No. 2003-4. As with the disclosures required by Chapter 9, the agency's disclosures would be made publicly available by the Board. The deadline for reporting donations received during the previous calendar year would be February 28, the same deadline for agencies to report to the Board, pursuant to Board Rules § 1-02(a)(2), the titles and names of public servants who have substantial policy discretion. Because subdivision (c) would make this reporting a requirement of Charter § 2604(b)(2), non-compliance would be a violation punishable by fine, pursuant to Charter § 2606(d).

Subdivision (d) would permit an agency head to make a written request to the Board that disclosure of a donor's name and/or amount of donation not be made public and would permit the Board, in response to such a request or on its own initiative, to determine that disclosure of a donor's name and/or amount of donation not be made public. The standard for such privacy determinations is the same standard the Board adopted in implementing Chapter 9. See Board

Rules § 3-04(c). The deadline for an agency head to make a written request pursuant to subdivision (d) would be January 31, midway between the end of the reporting year (December 31) and the deadline for reporting donations (February 28).

### **Text of the Proposed Rule**

New material is underlined.

[Deleted material is in brackets.]

Section 1. Section 1-14 of Title 53 of the Rules of the City of New York is amended to read as follows:

§ 1-14 [Reserved.] Official Fundraising.

(a) For purposes of Charter § 2604(b)(2) and Charter § 2604(b)(3), a public servant may use his or her position as a public servant to solicit a donation provided that all of the following conditions are met:

(1) The solicitation seeks a donation for one of the following:

- (i) the City agency or office served by the public servant;
- (ii) another City agency or office designated by the public servant's agency head, with the written approval of the head of the other agency or office;
- (iii) a not-for-profit organization subject to Chapter 9 of Title 3 of the Administrative Code over which the public servant's agency head exercises control as part of his or her City position; or
- (iv) a not-for-profit organization designated by the public servant's agency head pursuant to subdivision (b) of this section, provided that the public servant is not associated, within the meaning of Charter Section 2601(5), with the organization or an employee of the organization.



- (2) The solicitation is directed either to the general public or to an individual or firm that does not have a particular matter pending before the public servant.
- (3) The solicitation is accompanied by a disclaimer that a contribution will not affect any business dealings with the City or provide special access to City officials.
- (b) An agency head may designate in writing one or more not-for-profit organizations for solicitations made by agency or office employees pursuant to subdivision (a) of this section, provided that both of the following conditions are met:
- (1) the not-for-profit organization has a clear and direct nexus to the City and its residents and with the mission or duties of the City agency or office; and
- (2) the agency head is not associated, within the meaning of Charter Section 2601(5), with the organization or an employee of the organization.
- (c) Pursuant to Charter § 2604(b)(2), each agency head must report to the Board annually by February 28:
- (1) the name of any individual or firm that made one or more donations totaling \$5,000 or more to the agency during the previous calendar year, the total amount of these donations, and whether the donation was cash or an in-kind donation; and
- (2) the name of any not-for-profit organization designated by the agency head pursuant to subdivision (b) of this section for which agency employees solicited donations during the previous calendar year.
- (d) An agency head may submit to the Board a written request that disclosure, pursuant to subdivision (c)(1) of this section, of one or more of its donors and/or the amount of donation not be made public. The written request must be submitted no later than January 31 for the previous calendar year and must explain why the release of such information to the public

may cause harm, threats, harassment, or reprisals to the donor or to individuals or property affiliated with the donor. Whether or not an agency head has submitted a request pursuant to this subdivision, the Board may on its own initiative grant privacy as to any information submitted by an agency head, upon a finding by the Board that the release of such information would pose a risk to the safety or security of any person.

- (e) For purposes of this section, an elected official, including a District Attorney, is the agency head of the staff members in his or her office. The Speaker of the New York City Council is the agency head of the central staff of Council, and a Council Member is the agency head of the staff of his or her office.

**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:** Fundraising by Public Servants

**REFERENCE NUMBER:** 2019 RG 011

**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: March 6, 2019

**NEW YORK CITY MAYOR'S OFFICE OF OPERATIONS  
253 BROADWAY, 10<sup>th</sup> FLOOR  
NEW YORK, NY 10007  
212-788-1400**

**CERTIFICATION / ANALYSIS  
PURSUANT TO CHARTER SECTION 1043(d)**

**RULE TITLE:** Fundraising by Public Servants

**REFERENCE NUMBER:** COIB-7

**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/ Stephen Narloch  
Mayor's Office of Operations

March 6, 2019  
Date