

August 20, 2019, Agenda – Open Meeting Matter

July 25, 2019 – Public Hearing

June 12, 2019, Agenda – Open Meeting Matter

March 12, 2019, Agenda – Open Meeting Matter

February 28, 2019, Agenda – Open Meeting Matter

To: Members of the Board

From: Katherine Miller

Date: August 7, 2019

Re: Board Rules Chapter 2: Enforcement Procedures

As directed by the Board at its June 2019 meeting, Staff submitted the proposed amendments to Chapter 2 of the Board Rules, which contains the procedural rules for enforcement actions brought by the Board pursuant to Charter § 2603(h), to be published in the City Record on June 25, 2019, for public comment in advance of a public hearing. In accordance with the City’s Administrative Procedures Act (“CAPA”), the Board held a public hearing on July 25, 2019, to receive oral comments on the proposed amendments. The Board received no written comments in advance of the public hearing. At the public hearing, the Board received oral comments from Alex Camarda on behalf Reinvent Albany. Mr. Camarda also provided a written version of his testimony.

Staff recommends the Board adopt the text of the Rules and the Statement of Basis and Purpose as published in June with only stylistic changes to reflect that the Rules are no longer a proposal. Upon adoption of the Rules, the Board will publish a Notice of Adoption in the City Record, and the Rules will take effect 30 days after publication. Attached are the following:

- 1) Minutes of the February 28, 2019, Open Meeting (**Exhibit 1**);
- 2) Minutes of the March 12, 2019, Open Meeting (**Exhibit 2**);
- 3) Minutes of the June 12, 2019, Open Meeting (**Exhibit 3**);

- 4) Proposed Board Rules and Commentary, as submitted for publication in the City Record on June 25, 2019 (**Exhibit 4**);
- 5) Testimony of Reinvent Albany, submitted by Alex Camarda on July 25, 2019 (**Exhibit 5**);
- 6) Proposed Notice of Adoption of Final Rules, with changes tracked (**Exhibit 6**); and
- 7) Proposed Notice of Adoption of Final Rules (**Exhibit 7**).

Analysis & Discussion

Reinvent Albany makes six recommendations for the proposed Board Rules and two suggestions for legislative changes. The first two recommendations concern the data publicly reported by the Board in its annual report and its index of enforcement fines. Reinvent Albany asks the Board to promulgate rules to expand and codify what information the Board is required to report. Exhibit 5 at 2-4. While the Board may wish to address these recommendations at some future time, they are beyond the scope of the proposed Board Rules concerning the procedural rules for enforcement actions.

Relevant to the proposed Board Rules, Reinvent Albany asks the Board to: (1) identify the criteria for issuing public and private warning letters; (2) make public all OATH reports in which OATH has concluded a violation of law has occurred; and (3) identify what the Board will accept as mitigating factors. Exhibit 5 at 4. These recommended changes would effectively limit the Board's discretion and require the Board to articulate factors it considered during its confidential discussion of enforcement actions. Furthermore, the Board, as a matter of practice and policy, already articulates in each of its public enforcement documents – public warning letters, dispositions, and orders – the factors it considered in assessing the appropriate penalty. Thus, Staff recommends not incorporating these requested changes into the proposed Board Rules.

Additionally, Reinvent Albany asks the Board to clarify its procedures for imposing penalties against the mayor. Id. Reinvent Albany notes that Charter § 2603(h)(3) requires the Board to consult with the mayor before issuing an order imposing a penalty on the head of an agency but is silent on who should be consulted before issuing an order imposing a penalty on the mayor. Reinvent Albany asks that the Board act independently without consulting the mayor in those cases. Under the Charter, the Board retains authority to impose a penalty that it deems appropriate after consulting with an agency head or the mayor. Thus, the Board is already able to act independently when imposing penalties on the mayor, and the Board's procedures for imposing penalties on the mayor are the same as for any agency head; in fact, the Board independently imposed a penalty on the Brooklyn Borough President without any agency consultation. See *COIB v. Markowitz*, OATH Index No. 1400/11, COIB Case No. 2009-181 (Order July 21, 2011).

Finally, Reinvent Albany asks the Board to recommend legislative changes that would permit the Board to impose penalties on City Council Members and employees and to state explicitly that the Board is authorized to issue warning letters and resolve enforcement actions by settlement agreement. Exhibit 5 at 4-5. As recognized by Reinvent Albany, these recommendations cannot be addressed through this rulemaking process, and Reinvent Albany can petition the Council directly for the legislative changes it seeks.

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

Date: February 28, 2019

Location: Baker Hostetler, 45 Rockefeller Plaza, 14th Fl., New York, New York

Present:

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

Board Staff: Ethan Carrier, Chad Gholizadeh, Christopher Hammer, Gavin Kendall, Julia Lee, Carolyn Miller, Katherine Miller, Ari Mulgay, Jeff Tremblay, Michele Weinstat, Clare Wiseman, and Juliya Ziskina.

Guests: Edward King

The meeting was called to order by the Chair at approximately 9:36 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 Title 53 of the Rules of the City of New York, Board Rules Chapter 2 and § 1-14.

Board Rules Chapter 2:

After a brief introduction by a member of Board Staff on the proposed amendments to Board Rules Chapter 2, the Chair asked for any comments by the Board or Staff.

The following comments constitute the changes as agreed upon by the Board to the proposed amendments to Board Rules Chapter 2:

- Commentary: To include discussion of confidential letters issued to public servants.
- Board Rules § 2-01: No comments.
- Board Rules § 2-02(b)(1): To clarify that the response can address both factual and legal allegations in the Notice.
- Board Rules § 2-02(c)(2): To modify language such that the Board may proceed with its enforcement action without waiting for the conclusion of agency disciplinary action.
- Board Rules § 2-03(c)(2): To modify language in the last clause to reflect that the Board or the attorney serving as counsel to the Board determines if *ex parte* communications are necessary.
- Board Rules § 2-03(f)(1): To broaden language referring to “offers of settlement” to include offers and admissions.
- Board Rules § 2-03(c)(2) or § 2-03(i): To include a reference that Board review of the OATH report occurs in the absence of the Enforcement Unit attorneys.

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

Board Rules § 1-14:

After a brief introduction by a member of Board Staff on the proposed amendments to Board Rules § 1-14, the Chair asked for any comments by the Board or Staff.

In the Statement of Basis and Purpose of the Proposed Rule, on page 4, line 9, modify the first sentence to state: "Paragraph (a)(1) of Board Rules § 1-14."

Upon motion duly made and seconded, the Board unanimously voted to approve the proposed amendments as discussed as the final rule.

The open meeting was adjourned at approximately 10:45 a.m.

Respectfully submitted,

Julia Lee
Recording Secretary

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

Date: March 12, 2019

Location: Baker Hostetler, 45 Rockefeller Plaza, 14th Fl., New York, New York

Present:

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

Board Staff: Ethan Carrier, Chad Gholizadeh, Christopher Hammer, Gavin Kendall, Julia Lee, Carolyn Miller, Katherine Miller, Ari Mulgay, Jeff Tremblay, Michele Weinstat, Clare Wiseman, and Juliya Ziskina.

Guests: None

The meeting was called to order by the Chair at approximately 10:00 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 Title 53 of the Rules of the City of New York, Board Rules Chapter 2, Board Rules Chapter 3, Board Rules § 1-15, and Board Rules § 1-01.

Board Rules Chapter 2:

After a brief introduction on the proposed amendments to Board Rules Chapter 2, 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 approve the proposed amendments incorporating the changes as discussed as the final rule.

Board Rules Chapter 3:

After a brief introduction on the proposed amendments to Board Rules Chapter 3, the Chair asked for any comments by the Board or Staff.

The following comment constitutes the change as agreed upon by the Board to the proposed amendments to Board Rules Chapter 3:

- Board § 3-03(h): change “elected officials serve” to “elected official serves”

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

Board Rules § 1-15:

After a brief introduction by a member of Board Staff on the proposed amendments to Board Rules § 1-15, the Chair asked for any comments by the Board or Staff.

In the Statement of Basis and Purpose of the Proposed Rule, the following changes were agreed upon by the Board:

- To include language clarifying the status of all advisory opinions relating to community boards
- On p. 2, first paragraph: to modify language to reflect that, consistent with longstanding Board interpretation, the “catch-all” provision of Charter § 2604(b)(2) applies to City employment.

Upon motion duly made and seconded, the Board unanimously voted to continue discussion at the next Board meeting for Board Rules § 1-15 and § 1-01.

The open meeting was adjourned at approximately 10:45 a.m.

Respectfully submitted,

Julia Lee
Recording Secretary

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

Date: June 12, 2019

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, Christopher Hammer, Gavin Kendall, Julia Lee, Carolyn Miller, Katherine Miller, Ari Mulgay, Yasong Niu, Jeff Tremblay, Michele Weinstat, Clare Wiseman, and Juliya Ziskina.

Guests: None

The meeting was called to order by the Chair at approximately 11:15 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 Chapter 2.

After a brief introduction on the proposed amendments to Board Rules Chapter 2, 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 approve the proposed amendments incorporating the changes as discussed as the final rule.

The open meeting was adjourned at approximately 11:18 a.m.

Respectfully submitted,

Julia Lee
Recording Secretary

New York City Conflicts of Interest Board

Notice of Public Hearing and Opportunity to Comment on Proposed Rules Regarding Procedural Rules for Enforcement Actions

What are we proposing? The Conflicts of Interest Board intends to amend its rules by revising Chapter 2 in its entirety to update the Board's procedural rules for enforcement actions brought pursuant to Charter § 2603(h).

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 10:00 a.m. on July 25, 2019. The hearing will be at Spector Hall at 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 Katherine Miller, Assistant Counsel, at Rules@COIB.nyc.gov
- **Mail.** You can mail comments to Katherine Miller, 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) 437-0730. You can also sign up in the hearing room before the hearing begins on July 25, 2019. You can speak for up to three minutes.

Is there a deadline to submit comments? Yes, you must submit written comments by July 25, 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 July 19, 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 and 2603(a) 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

Overview

The Board is proposing that Chapter 2 of the Rules of the Board (“Procedural Rules for Hearings”), which contains the Board’s procedures for enforcement actions commenced pursuant to Charter § 2603(h), be repealed and re-promulgated.

As a result of the work of the Charter Revision Commission (“Commission”) in the late 1980s, the Conflicts of Interest Board (“Board”) was created to replace the Board of Ethics, an agency that had the power to issue advice but not to prosecute those who failed to comply with the ethics code. Recognizing that “the lack of enforcement power in the Board of Ethics was a significant flaw in the law,” the Commission proposed, and the City’s voters approved, the creation of a new Board with the power to adjudicate alleged violations of the conflicts of interest law. Volume II, Report of the New York City Charter Revision Commission, December 1986 – November 1988, at p. 163.

Shortly thereafter, the Board promulgated the existing version of Chapter 2 to establish a structure for implementing its new enforcement process. In the more than two decades since, the Board has gained substantial experience adjudicating allegations of Chapter 68 violations. In doing

so, the Board has learned which provisions of Chapter 2 work well, which do not, and which could benefit from clarification. Over the years, the Board has also utilized additional procedures to fill in the gaps left by the existing rules. The Board proposes that Chapter 2 be comprehensively revised both to reflect its current enforcement process and to improve, where needed, various aspects of that process.

The Board's proposed procedural rules are designed to ensure that the subject of an enforcement action – the “respondent” – is afforded a full and fair opportunity to be heard by the Board. The first step in ensuring that a respondent has an opportunity to be heard by the Board is for the respondent to be able to understand what to expect during the enforcement process. When the Commission proposed creating a Board having rulemaking authority, it stated that the Board's promulgated rules “may include rules necessary to assist members of the public and public servants to participate in the board's processes.” Volume II, Report of the New York City Charter Revision Commission, December 1986 – November 1988, at p. 156. The Board proposes this revised version of Chapter 2 as a “plain language” guide to help respondents navigate that process, especially because many respondents represent themselves *pro se* before the Board and the confidentiality restrictions of Chapter 68 shield much of the Board's process from public view. Furthermore, because the Board's enforcement process has developed beyond the existing procedural rules, the proposed rules would codify the Board's current practice, thus providing more comprehensive guidance to respondents.

The proposed revisions to Chapter 2 would provide clarity around three main topics: (i) the two-phase enforcement process; (ii) hearings; and (iii) settlements. As provided for in Charter § 2603(h), respondents have two opportunities to respond to and resolve charges brought by the Board: first, through an informal proceeding; and then, if charges are not resolved during that

informal phase, through a formal proceeding. The proposed new Chapter 2 would codify this two-phase approach by creating separate sections to address each type of proceeding. With regard to formal proceedings, the Board, like most City agencies, has come to rely exclusively on the expertise of professional Administrative Law Judges at the New York City Office of Administrative Trials and Hearings (“OATH”) to hold adjudicatory hearings. The Board proposes revising Chapter 2 to reflect this practice and to eliminate references to hearings held by the Board or a Board Member.

Recognizing that the majority of respondents choose to forgo a hearing and resolve their enforcement actions by settlement agreement, the Board also proposes revising Chapter 2 to explain more fully the settlement process. While the existing rules provide for “disposition by agreement,” the Board’s enforcement attorneys frequently must explain the specific requirements of the Board’s settlement process to respondents. The revised rules would provide more detail concerning the requirements for settlement agreements and the process by which such agreements are approved by the Board.

Finally, the proposed version of Chapter 2 would eliminate references to “§ 12-110 of the Administrative Code” (the section that constitutes the Annual Disclosure Law) because the Board has a separate set of procedures for enforcement of this law.

Proposed § 2-02 Informal Proceedings

Proposed § 2-02 would explain the Board’s informal proceedings. During this phase, a respondent has the opportunity to respond to the Board in writing and to conclude the enforcement action through dismissal or settlement without going through the formalities of an adjudicatory hearing. If the enforcement action is not concluded during this phase, the respondent will have

another opportunity to do so through the hearing process. Proposed Board Rules § 2-02 would identify the steps that take place between the Board's initial determination of probable cause and, if necessary, the Board's decision to proceed to a hearing at OATH.

Pursuant to Charter § 2603(h)(1), when the Board determines that there is probable cause to believe that an individual or organization under its jurisdiction has violated an applicable law (see proposed Board Rules § 2-01(a)), the Board commences an enforcement action by sending the respondent a Notice of Initial Determination of Probable Cause ("Notice"). See Proposed Board Rules § 2-02(a). Alternatively, if the Board determines that there is insufficient evidence to support an initial determination of probable cause, or if the violation is minor, or if there is some other mitigating or extenuating factor, the Board could issue a confidential letter stating the alleged facts and advising the recipient about the relevant provisions of the applicable law.

After the Board commences an enforcement action by sending the Notice, the respondent may submit a response to the Board. Proposed Board Rules § 2-02(b) would clarify that the response must be submitted in writing for the Board's review. The response is an opportunity for the respondent to demonstrate why the Board should reconsider its initial determination of probable cause. If the respondent believes that the facts alleged in the Notice are incorrect, incomplete, or need clarification, the respondent may submit a response, including supporting evidence, to explain those circumstances. Similarly, if the respondent believes that the Board has misapplied the applicable law to the alleged facts, the respondent can present those arguments in a response. Proposed Board Rules § 2-02(b)(3)(i) would explain that the Board thoroughly reviews all information and arguments in a response to determine whether any or all of the violations alleged in the Notice should be dismissed. However, if a respondent provides no new information or legal arguments to the Board, there would be nothing for the Board to reconsider and the Board's

initial determination of probable cause would be deemed sustained. See Proposed Board Rules § 2-02(b)(3)(ii).

After receiving the Notice, respondents occasionally request that the Board provide to them evidence of the facts upon which the Board relied in making its initial determination of probable cause. Because the Board has learned that discovery is better handled under the supervision of an OATH Administrative Law Judge (“ALJ”), proposed Board Rules § 2-02(b)(1) would inform respondents that discovery is not available during informal proceedings but rather should be sought after the commencement of formal proceedings at OATH.

Pursuant to Charter § 2603(h)(1), the Board is required to give the respondent a reasonable amount of time to respond to the Notice. Proposed Board Rules § 2-02(b) would specify the prescribed time within which a respondent could submit a response, both to reflect the Board’s current practice and to establish a process by which the respondent may seek an extension of that deadline. Under existing Board Rules §§ 2-01(a) and 2-05(e), the respondent has fifteen days from the date of service, or twenty days if service was by mail, to respond to the Notice. Because the Notice is always served by first-class mail, proposed Board Rules § 2-02(b)(1) would clarify that the respondent has twenty days from the date of service to respond to the Notice.

Upon receiving the Notice, many respondents request an extension of the twenty-day deadline, which the Board generally grants, to pursue settlement discussions or to give the respondent more time to prepare a response. Proposed Board Rules § 2-02(b)(2) would set parameters for requesting and granting extensions and establish specific time limits for those extensions. These specific time limits would both give respondents adequate time to respond and prevent enforcement actions from languishing; if the Board does not receive a written response or

a request for an extension within the prescribed time, the Board's initial determination of probable cause would be deemed sustained pursuant to proposed Board Rules § 2-02(b)(3)(ii).

Pursuant to Charter § 2603(h)(2), if the Board sustains its initial determination of probable cause concerning any of the violations alleged in the Notice, the Board proceeds to a hearing or, if the respondent is still employed by the agency where the alleged violation(s) occurred and is entitled to disciplinary rights, the Board refers the matter to the respondent's City agency. Proposed Board Rules § 2-02(c) would explain the process by which the Board refers the respondent's alleged violations to his or her City agency and would clarify that, even if a matter has been referred to such agency, the Board retains jurisdiction over the enforcement action and may still proceed to a hearing, as contemplated by Charter § 2603(h)(6), should the agency decline to take disciplinary action or if the Board is unable to resolve the matter by a joint settlement with the respondent and agency.

Rather than proceeding to a hearing, the respondent may choose to resolve the Board's enforcement action through settlement. While existing Board Rules § 2-05(h) provides for "disposition by agreement," this current provision offers limited guidance to respondents about the contents of such agreements or the settlement process generally. Proposed Board Rules § 2-02(f) would address the entire settlement process by articulating the requirements and procedures developed by the Board for the negotiation and approval of settlements.

A settlement agreement with the Board could take the form of either a Public Disposition or a Public Warning Letter. While the majority of enforcement actions are settled with a Public Disposition, the Board could offer to settle a matter with a Public Warning Letter under limited circumstances, such as when mitigating factors are present. For each form of settlement agreement, the Board would continue to require that the agreement contain certain information. See Proposed

Board Rules § 2-02(f)(1). Just as Charter § 2603(h)(4) requires all Board orders be made public as the final disposition in an enforcement action, the Board likewise would continue to require that all settlement agreements be made public, as a means for educating other City employees about the Board's interpretation of the applicable law. See Proposed Board Rules § 2-02(f)(4)(i).

As is the Board's current practice, a proposed settlement agreement would not be final until all monetary penalties due to the Board have been paid and the agreement is signed by the Board. Because many settlement agreements include the payment of a monetary penalty to the Board, proposed Board Rules § 2-02(f)(3) would codify the Board's practice with regard to the timing and handling of such payments, and proposed Board Rules § 2-02(f)(4) would clarify that a proposed settlement agreement would not be presented to the Board for final approval until all monetary penalties due to the Board have been paid. When the Board reviews a proposed settlement, there is a possibility that the Board might request a different penalty or ask to modify language in the agreement. Thus, proposed Board Rules § 2-02(f)(4) would inform respondents that a proposed settlement agreement is not final until it is approved and signed by the Board.

When negotiating a settlement, respondents occasionally request that their employing City agency be joined as a party to avoid possible future disciplinary action by their agency for the same conduct. Proposed Board Rules § 2-02(f)(2) would inform respondents that, if the respondent submits a waiver of confidentiality, the Board may speak to such agency about a joint settlement.

Proposed § 2-03 Formal Proceedings

Proposed § 2-03 would explain the Board's formal proceedings. During this phase, the respondent would have an opportunity to respond to the Board's charges and present evidence at an adjudicatory hearing before an OATH ALJ. As is OATH's practice, the ALJ would issue a

report to the Board, and the Board would review the report, along with the evidentiary record, to make its final determination about whether the respondent violated the applicable law. Proposed Board Rules in § 2-03 would address the steps that take place between commencement of formal proceedings at OATH and final action by the Board.

Pursuant to Charter § 2603(h)(2), the Board “shall hold or direct a hearing to be held” to determine whether the respondent has violated the applicable law. When the existing rules were drafted, the Board envisioned that hearings might be conducted by the Board, a member of the Board, or OATH. However, neither the Board nor any Board member has ever held a hearing. Instead, all such hearings are conducted by the OATH Trial Division. OATH provides an impartial forum and is staffed by professional ALJs who regularly handle adjudicatory proceedings for many City agencies. Proposed Board Rules § 2-03(a) would codify the Board’s current practice of hearings being conducted at OATH in accordance with OATH’s Rules of Practice, which are set forth in Title 48 of the Rules of the City of New York (“OATH Rules”). Once the Board commences formal proceedings, the OATH Rules govern the hearing process.

Because OATH has its own set of procedural rules, these proposed Board Rules would eliminate existing provisions that are redundant of the OATH Rules, except for a few provisions to provide additional guidance to respondents or impose requirements beyond the OATH Rules. To ensure that respondents understand when the Board has commenced formal proceedings, proposed Board Rules § 2-03(b) would identify the documents that are served and filed by the Board, as required by the OATH Rules, and would specify the precise method of service for those documents. Because the Board tries to coordinate with respondents about dates for a settlement conference and a hearing before filing a Petition at OATH, proposed Board Rules § 2-03(b)(1) would provide context to this request. Under the OATH Rules, the respondent may submit an

answer to the Board's charges in the Petition. Expanding on the OATH Rules, proposed Board Rules § 2-03(d) would retain and expand upon existing Board Rules § 2-02(d), which advises respondents about the information they may want to include in an answer and requires them to provide their contact information. Because this topic is not addressed by the OATH Rules, proposed Board Rules § 2-03(f) would codify the Board's existing burden of proof standard for finding that the respondent violated the applicable law. Additionally, proposed Board Rules § 2-03(f) would provide guidance to respondents concerning the trial sequence.

After a hearing conducted at OATH, the ALJ would issue a report of recommended findings of fact and conclusions of law and recommended disposition for the enforcement action, which may include imposing a penalty or dismissing some or all of the Board's charges. See Proposed Board Rules 2-03(g). Under existing Board Rules § 2-04(a), the respondent and the enforcement attorney have ten days from the date of service of the report to submit a comment to the Board. In practice, the respondent often needs more than ten days and the enforcement attorney may wait to see what, if anything, the respondent submits before making a submission. Proposed Board Rules § 2-03(h) would revise the prescribed time within which to submit a comment to the Board and would establish a fairer process by giving the parties both a longer amount of time to submit a comment to the Board as well as an opportunity to respond to the comment submitted by the opposing party.

Proposed Board Rules § 2-03(i) would codify the Board's burden of proof standard and identify the specific materials reviewed by the Board in making its final determination about whether the respondent violated the applicable law. If the Board determines that the respondent has committed a violation, the Board issues an order to the respondent pursuant to Charter

§ 2603(h)(3). Proposed Board Rules § 2-03(j)(1) would provide a more concise and plain language description of the content of such orders, and make clear that all Board orders are made public.

Furthermore, proposed Board Rules §§ 2-03(g) and 2-03(j)(2) would make clear that, while the OATH report is confidential at the time it is issued, the report may become public as part of the Board's final order. Finally, proposed Board Rules § 2-03(j)(3)-(4) would codify the method of service for Board orders and the Board's practice of setting a thirty-day deadline from the date of service for the payment of a monetary penalty imposed in a Board order. Alternatively, if the Board determines, after a hearing, that there is not sufficient evidence to determine that the respondent violated the applicable law, proposed Board Rules § 2-03(k) would explain that the respondent will be sent the Board's final decision in writing and that all materials remain confidential.

Throughout the formal proceedings phase, the attorneys in the Board's advice unit act as counsel to the Board when the Board reviews the materials and makes its final determination. Thus, proposed Board Rules § 2-02(c) would retain the practice and policy embodied by existing Board Rules 2-05(g) by prohibiting *ex parte* communications between the enforcement attorney and the Board's advice attorneys regarding the merits of the enforcement action after formal proceedings have been commenced.

Text of Proposed Board Rules

New material is underlined.

[Deleted material is in brackets.]

Section 1. Chapter 2 of Title 53 of the Rules of the City of New York is REPEALED and a new Chapter 2 is re-promulgated to read as follow:

Chapter 2: Procedural Rules for Enforcement Actions

§ 2-01 Applicability and Definitions.

(a) Applicability.

This chapter establishes the procedural rules for enforcement actions brought pursuant to Charter § 2603(h) to address alleged violations of:

- (1) Chapter 68 of the City Charter (the Conflicts of Interest Law);
- (2) § 3-224 through § 3-228 of the Administrative Code (the Lobbyist Gift Law);
- (3) § 3-901 through § 3-907 of the Administrative Code (the Affiliated Not-for-Profits Law); and
- (4) § 3-1101 through § 3-1107 of the Administrative Code (the Legal Defense Trusts Law).

(b) Definitions.

“Board” means the Conflicts of Interest Board.

“Board Rules” means the rules of the Conflicts of Interest Board, as set forth in Title 53 of the Rules of the City of New York.

“Day” means a calendar day. When the last day of a time period is a Saturday, Sunday, or public holiday, the time period will run through the end of the next business day.

“Enforcement attorney” means an attorney prosecuting an enforcement action on behalf of the Board.

“OATH” means the New York City Office of Administrative Trials and Hearings.

“OATH Rules” means OATH’s Rules of Practice, as set forth in Title 48 of the Rules of the City of New York.

“Respondent” means a public servant or former public servant; a lobbyist or any other person required to be listed on a statement of registration pursuant to Administrative Code § 3-213(c)(1); an organization affiliated with an elected official or an agent of an elected official, as defined by Administrative Code § 3-901; or a legal defense trust, trustee, or beneficiary, as defined by Administrative Code § 3-1101, who has been served a Notice of Initial Determination of Probable Cause.

§ 2-02 Informal Proceedings.

(a) Notice of Initial Determination of Probable Cause.

For the purposes of Charter § 2603(h)(1), the Board will commence an enforcement action by serving a Notice of Initial Determination of Probable Cause by first class mail to the respondent’s last known residential address or actual place of business.

(b) Response to the Notice of Initial Determination of Probable Cause.

(1) For the purposes of Charter § 2603(h)(1), the respondent has twenty (20) days from the date of service to submit a written response to the Notice of Initial Determination of Probable Cause (“Notice”) or request an extension. The response is an opportunity to explain, rebut, or provide information concerning the factual or legal allegations in the Notice. The Board will not consider requests for discovery of evidence during informal proceedings.

(2) Upon oral or written request within twenty (20) days from the date of service of the Notice, the respondent will be granted a thirty- (30-) day extension within which to submit a written response. Upon oral or written request made prior to the expiration of

the first extension, the respondent may be granted a second thirty- (30-) day extension for good cause shown, including, but not limited to, ongoing settlement negotiations. Any further extensions must be requested in writing to the Board and will be granted only in exigent circumstances.

(3) For the purposes of Charter § 2603(h)(2):

- (i) If the respondent submits a substantive written response to the Notice, the Board will review the response to determine whether there remains probable cause to believe that any alleged violation occurred and will either dismiss the enforcement action or sustain its initial determination of probable cause in whole or in part.
- (ii) If the respondent does not submit a written response to the Notice or submits only a general denial of the allegations in the Notice, the Board's initial determination of probable cause will be deemed sustained.

(c) Referral to agency.

If the Board sustains its initial determination of probable cause against a respondent who is entitled to disciplinary rights as described in Charter § 2603(h)(2), the Board will notify the respondent's employing City agency in writing of the alleged facts and violations. After such a referral, the Board retains separate and continuing jurisdiction over the enforcement action.

- (1) If the agency does not pursue disciplinary action against the respondent, the Board will commence formal proceedings against the respondent.

(2) If the agency pursues disciplinary action against the respondent, the Board may resolve the enforcement action by a joint settlement agreement with the respondent and agency or commence formal proceedings against the respondent.

(d) Representation by an attorney or other person.

(1) If the respondent chooses to be represented by an attorney or any other person, the representative appearing for the respondent must submit a written and signed Notice of Appearance to the Board. The appearance of a member in good standing of the bar of a court of general jurisdiction of any state or territory of the United States will be indicated by the designation "Attorney for (person represented)." The appearance of any other person will be indicated by the designation "Representative for (person represented)." The Board will not accept a response from or discuss the details of an enforcement action with any attorney or other person who has not submitted a Notice of Appearance.

(2) To withdraw from representation, the representative must submit a written notice of withdrawal to the Board, signed by the respondent or otherwise explaining the reason for withdrawal. An attorney who has submitted a Notice of Appearance may withdraw from representation only with consent of the respondent or when other cause exists, as delineated in the applicable provisions of the New York Rules of Professional Conduct.

(3) A Notice of Appearance, withdrawal or substitution may be submitted to the Board at any time prior to commencement of formal proceedings. After the service of the Notice of Petition and Petition pursuant to Board Rules § 2-03(b)(1), the OATH Rules govern the procedures for a Notice of Appearance, withdrawal or substitution.

(e) Stay of an enforcement action.

To obtain a stay of an enforcement action prior to commencement of formal proceedings, the respondent must submit a written request to the Board for its review and approval. After the service of the Notice of Petition and Petition pursuant to Board Rules § 2-03(b)(1), the OATH Rules govern the procedures for a stay.

(f) Settlement.

(1) At any time after the service of the Notice of Initial Determination of Probable Cause, an enforcement action may be resolved by settlement agreement in the form of a Public Disposition or Public Warning Letter.

(i) A Public Disposition must include an admission of the relevant facts; an acknowledgment that the admitted conduct violated a specific provision of the Conflicts of Interest Law, the Lobbyist Gift Law, the Affiliated Not-for-Profits Law, or the Legal Defense Trusts Law; and a penalty that addresses the admitted conduct.

(ii) A Public Warning Letter must include a statement of relevant facts, and a description of each violation of a specific provision of the Conflicts of Interest Law, the Lobbyist Gift Law, the Affiliated Not-for-Profits Law, or the Legal Defense Trusts Law.

(2) The language and penalty of the proposed settlement agreement will be negotiated between the enforcement attorney and the respondent or the respondent's representative, if applicable. If the respondent requests that the respondent's employing

City agency be a party to the settlement, the respondent must submit a signed waiver of confidentiality to the Board to allow the enforcement attorney to discuss the proposed settlement agreement with such agency.

- (3) If the enforcement attorney and the respondent reach a proposed settlement agreement, it will be reduced to writing and signed by the respondent, the respondent's representative, if applicable, and a representative of the respondent's employing City agency, if applicable. Any monetary penalty to be paid to the Board is due upon signing unless otherwise specified in the proposed settlement agreement. Monetary penalty payments will be held by the Board in escrow until the proposed settlement agreement is fully executed by the Board.
- (4) After receiving the full payment of any monetary penalty to be paid to the Board, the enforcement attorney will present the proposed settlement agreement to the Board for its review and approval.
- (i) If the Board approves the proposed settlement agreement, the settlement agreement will be signed by the Board Chair. The fully-executed settlement agreement will be made public, but all underlying records, reports, memoranda, and files of the enforcement action will remain confidential in accordance with Charter § 2603(k).
 - (ii) If the Board does not approve the proposed settlement agreement, the Board may direct the enforcement attorney to seek modification of the penalty or the language in the settlement agreement. The modified proposed settlement agreement must be reviewed and approved by the Board.

§ 2-03 Formal Proceedings.

(a) Designation of OATH.

For the purposes of Charter § 2603(h)(2), and in accordance with Charter § 1048, the Board designates OATH to conduct hearings in accordance with the OATH Rules, except as otherwise provided by these rules.

(b) Commencement of formal proceedings.

- (1) The Board will commence formal proceedings at OATH by serving a Notice of Petition and Petition by certified mail, return receipt requested, and first class mail, to the respondent's last known residential address or actual place of business and to the respondent's representative, if applicable. After service, the enforcement attorney will file the Notice of Petition and Petition with OATH and will provide OATH with potential dates for a settlement conference and potential dates for a hearing.
- (2) After the conference and hearing dates have been scheduled at OATH, the enforcement attorney will serve a Notice of Hearing by certified mail, return receipt requested, and first class mail, to the respondent's last known residential address or actual place of business and to the respondent's representative, if applicable.

(c) Ex Parte communications with the Board.

- (1) After service of the Notice of Petition and Petition pursuant to Board Rules § 2-03(b)(1), any Board attorney involved in the prosecution of the enforcement action may not communicate *ex parte* with any member of the Board or any attorney serving as

counsel to the Board concerning the merits of the enforcement action, except as provided in paragraph (2) of this subdivision.

- (2) An enforcement attorney may communicate *ex parte* with members of the Board or an attorney serving as counsel to the Board with respect to ministerial matters involving the enforcement action; on consent of the respondent or respondent's representative; or if deemed necessary by the Board or by an attorney serving as counsel to the Board.

(d) Answer.

The respondent may serve and file a written answer to the Petition in accordance with the OATH Rules. The answer may contain specific responses, by admission, denial, or otherwise, to each allegation of the Petition and assert all affirmative defenses, if any. The respondent may include in the answer matters in mitigation. The answer must contain the full name, address, telephone number, and email address of the respondent. If the respondent is represented, the representative's name, address, telephone number and email address must also appear on the answer. The answer must be signed by the respondent or respondent's representative.

(e) Settlement.

At the OATH settlement conference, an enforcement action may be resolved by settlement agreement pursuant to Board Rules § 2-02(f).

(f) Hearing.

- (1) The enforcement attorney will have the burden of proof by a preponderance of the evidence.

- (2) The enforcement attorney will make an opening statement first, after which the respondent may make an opening statement.
- (3) The enforcement attorney will initiate the presentation of evidence. After the enforcement attorney has completed the presentation of the Board's evidence, the respondent may present evidence. The enforcement attorney may present rebuttal evidence.
- (4) The enforcement attorney will make a closing statement first, after which the respondent may make a closing statement.

(g) OATH report.

After a hearing has been conducted, OATH will issue a confidential report of its recommended findings of fact and conclusions of law and its recommended disposition of the enforcement action. OATH will send the report, along with the original transcript of the hearing and all documents introduced into the record, to the Board for review. OATH will send a copy of the report to the enforcement attorney and the respondent or respondent's representative, if applicable.

(h) Comment on OATH report.

Within twenty (20) days from the date of the OATH report, each party may submit a comment to the Board to explain, rebut, or provide information concerning OATH's recommended findings of fact, conclusions of law, and disposition. If either party submits a comment, the opposing party may submit to the Board a response to such comment within thirty (30) days from the date of the OATH report. Copies of all such submissions must be shared with the opposing party. The Board will not consider new evidence submitted in a comment or in a response to a comment.

(i) Final review by the Board.

For the purposes of Charter § 2603(h)(3), the Board will review the OATH report, along with the original transcript of the hearing and all documents introduced into the record, and any comments and responses to comments submitted to the Board pursuant to Board Rules § 2-03(h), to determine whether it has been proven by a preponderance of the evidence that the respondent violated a provision of the Conflicts of Interest Law, the Lobbyist Gift Law, the Affiliated Not-for-Profits Law, or the Legal Defense Trusts Law. In accordance with Board Rules § 2-03(c), any Board attorney involved in the prosecution of the enforcement action will not participate in the Board's final review.

(j) Board order finding a violation.

- (1) If the Board determines that it has been proven by a preponderance of the evidence that the respondent violated a provision of the Conflicts of Interest Law, the Lobbyist Gift Law, the Affiliated Not-for-Profits Law, or the Legal Defense Trusts Law, the Board will issue an order stating its final findings of fact and conclusions of law and imposing a penalty, except, if the respondent is a current Member or employee of the New York City Council, the Board will issue an order stating its final findings of fact and conclusions of law and recommending a penalty to the New York City Council. The order will include notice of the respondent's right to appeal to the New York State Supreme Court.

- (2) All orders of the Board will be made public. The Board may also make the OATH report public as part of its order, but all other underlying records, reports, memoranda, and files will remain confidential in accordance with Charter § 2603(k).
- (3) The order will be sent by first class mail to the respondent's last known residential address or actual place of business and to the respondent's representative, if applicable.
- (4) If the order imposes a monetary penalty, payment is due to the Board within thirty (30) days of the date of service. If the respondent does not pay the full monetary penalty amount, the Board will refer the matter to the New York City Law Department for collection.

(k) Board dismissal.

If the Board determines that it has not been proven by a preponderance of the evidence that the respondent violated any provision of the Conflicts of Interest Law, the Lobbyist Gift Law, the Affiliated Not-for-Profits Law, or the Legal Defense Trusts Law, the Board will issue a written decision that dismisses the enforcement action and states its final findings of fact and conclusions of law. The decision will be sent to the respondent and respondent's representative, if applicable, and will not be made public. All underlying records, reports, memoranda, and files will remain confidential in accordance with Charter § 2603(k).

**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: Procedural Rules for Enforcement Actions

REFERENCE NUMBER: 2019 RG 014

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: May 22, 2019

**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: Procedural Rules for Enforcement Actions

REFERENCE NUMBER: COIB-8

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 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

May 24, 2019
Date

**Testimony to the New York City Conflicts of Interest Board (COIB) on
Proposed Rules for Enforcement Actions
(Chapter 2 pursuant to Charter section 2603(h))**

July 25, 2019

Good afternoon Chair Briffault and members of the Conflicts of Interest Board. My name is Alex Camarda, and I am the Senior Policy Advisor for Reinvent Albany. Reinvent Albany is a government watchdog organization that advocates for open and accountable government. While we largely focus on Albany, we have an interest in strengthening ethics in New York City because the City serves as a model for better ethics laws and practices.

Reinvent Albany supported [Local Law 177 of 2018](#), which requires COIB promulgate rules for its advisory opinions that are binding on public servants generally and have interpretative value. We support COIB updating and clarifying its rules on its enforcement procedures to make its operations clear to the public.

COIB is repealing and replacing Chapter 2 of the Rules of the Board (“Procedural Rules for Hearings”) promulgated pursuant to the New York City Charter Chapter 68, section 2603(h). Section 2603(h) generally describes the process by which a public servant is informed of an alleged ethics violation, and the subsequent adjudication process.

Reinvent Albany generally believes that to ensure public confidence in government, there needs to be more transparency regarding allegations of ethics violations and how they are handled. We recognize the importance of protecting the reputation of public servants targeted by frivolous or unfounded complaints. However, we believe transparency is critical to measuring how actively ethics bodies are conducting enforcement, and needs to be prioritized. Our recommendations below for COIB’s rules emanate from this overarching belief.

Recommended Changes for Draft Rules

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OPEN, ACCOUNTABLE, EFFECTIVE GOVERNMENT
148 Lafayette, 12th Floor, New York, NY 10013

- 1. COIB should promulgate rules regarding what statistical information should be included in its annual report related to complaints, referrals, and their disposition.** Under section 2603(h)(7)(i), COIB is required to issue an [annual report](#) with “a statistical summary and evaluation of complaints and referrals received and their disposition” but may not disclose information that “would constitute an unwarranted invasion of privacy of the public servant.” COIB’s 2018 annual report contains valuable information on its work and [we commend COIB for placing its annual report data in the city’s Open Data portal](#). We believe the report can, however, make COIB’s ethics enforcement more transparent by including more critical information.

Reinvent Albany recommends the following additional statistical information be added to the annual report:

- **Number of complaints received and complaints dismissed by COIB. This information should be tracked and disaggregated by complaints filed by agencies and the public, and by alleged violation of law and subject matter.**
- **Number of COIB initial determinations that there is probable cause an ethics violation occurred**, as measured by Notices of Initial Determination of Probable Cause sent to respondents. One alternative would be making known the number of sustained determinations of probable cause after a respondent has addressed allegations of wrongdoing. JCOPE provides aggregate data in its annual report on the number of 15-day letters it issues to persons that are the subject of investigations.¹
- **Number of referrals to city agencies disaggregated by agency.** The number of referrals relative to the number of employees at any agency is highly unlikely to compromise the privacy of any public servant alleged to have violated ethics laws.
- **Number of referrals to city agencies in which neither the agency nor COIB ultimately took an enforcement action.**
- **Number of active cases (disaggregated by alleged laws violated, subject matter and by agency of the public servant)**, not just cases received and closed within a year. The data disclosed by COIB in its 2018 annual report shows that since 2008 more cases have been closed (4,498) than opened (4,919), making it impossible to tell how many active cases

¹ New York State Joint Commission on Public Ethics. 2018 Annual Report, pgs. 49-51. Available at: <https://jcope.ny.gov/system/files/documents/2019/04/2018-annual-report-compiled-final41019.pdf>

COIB currently has or if these numbers are accurate. JCOPE provides in its annual report matters processed during the year, in addition to open investigations and pending matters at year end.²

- **Statistics on the duration of cases including median, average, and percentages of cases taking particular periods of time.**
- **Types of violations (disaggregated by laws violated, subject matter and by agency of the public servant) for closed cases.**
- **Number of cases resolved by settlement alone and number of cases for which hearings were held by Office of Administrative Trials and Hearings (OATH) (disaggregated by laws violated, subject matter and by agency of the public servant).** JCOPE provides in its annual report aggregate data on the number of settlements and describes settlements that are completed.³
- **Statistics on penalties, including average and median fines, for different types of violations (subject matter and law), disaggregated by settlement or formal hearing.** COIB should indicate the number of penalties issued for each of the various types of penalties administered as specified in section 2606 of the Charter, including payment of any ill-gotten gains or benefits as a result of the ethics violation, forfeiture of public office or employment, and disqualifications from being elected, appointed or employed by the City.

This data should be tracked and reported publicly by COIB not only to inform the public on its operations and the state of ethical conduct in the City, but also for COIB to monitor and improve its operations. For example, COIB should conduct more training at agencies with a large proportion of violations or complaints, and review ethics laws most often violated.

- 2. COIB should clarify information to be included in its index of persons made available for public inspection.** Under section 2603(h)(5), COIB is required to “maintain an index of all persons found to be in violation of this chapter, by name, office and date of order. The index and the determinations of probable cause and orders in such cases shall be made available for public inspection and copying.” [The current index](#), available in the City’s Open Data portal, lists little information about the public servants who have been fined by COIB, not even including their full names. [We recognize more detailed](#)

² New York State Joint Commission on Public Ethics. 2018 Annual Report, p. 51. Available at: <https://jcope.ny.gov/system/files/documents/2019/04/2018-annual-report-compiled-final41019.pdf>

³ Ibid, pgs 51-52.

- [information is provided for cases on the New York Law School's website](#), but the index should provide full names of ethics violators and a more complete summary statement of laws and ethics violated to make it more useful. The summaries at the top of the orders could be provided in the index, for example.
3. **COIB should identify the criteria for when it issues public and private warning letters.** COIB has issued 653 private warning letters since 2008, and 172 public warning letters. [COIB told the Gotham Gazette that letters are issued when there is not enough evidence to support a violation, legal reasons bar formal enforcement action, or an agency alone has taken disciplinary action on the matter.](#) Issuing letters only when COIB cannot impose penalties is good, but as it's unclear where COIB has the authority to issue warning letters in the law, we believe the Board should promulgate rules on issuing letters. We also think public letters should be issued as much as legally possible relative to private letters, and the rules should clarify when a letter is public or private.
 4. **COIB should make all OATH reports public in which OATH has concluded a violation of law has occurred.** [The Joint Commission on Public Ethics \(JCOPE\) makes substantial basis investigation reports public even when penalties may not ultimately be assessed by JCOPE or the Legislative Ethics Commission.](#) New Rule 2-03(j)2 gives discretion to COIB regarding when to make OATH reports with findings of fact and conclusions of law public.
 5. **COIB should make known what it will accept as mitigating factors when determining whether ethics violations occurred or assessing penalties.**
 6. **COIB should promulgate rules clarifying how it imposes penalties when ethics violations are committed by the Mayor. We believe it should act independently, without consulting the mayor, if the mayor is the public servant in violation.** Under section 2603(h)(3), COIB is required to consult with the mayor before assessing penalties if the violating public servant is the head of an agency. The law is silent on how COIB handles a violation by the mayor himself. COIB should, at the very least, clarify its current procedures.

While we understand COIB does not have the authority to change 2603(h) via rule, COIB can make recommendations for legislative changes. **Reinvent Albany believes the Mayor and City Council should change section 2603(h) as follows:**

- 1. COIB should be authorized to impose penalties on City Councilmembers, and public servants who work for the City Council, in consultation with the City Council Speaker.** Under current law, COIB recommends penalties to the City Council when a violation of the ethics laws has occurred but cannot impose penalties even though the City Council approves members of COIB. We see no reason why penalties should be recommended to the City Council when COIB can impose penalties on the offices of the borough president, public advocate, or city comptroller. This is particularly problematic if the City Council Speaker is in violation of ethics laws, in which case the Speaker would have to decide on penalties for his or her own ethics violations.
- 2. COIB should be expressly authorized to negotiate settlements in lieu of formal hearings for ethics cases and to issue warning letters in very limited and prescribed circumstances.** We do not see in the law where COIB has the authority to conduct settlements, though we are not opposed to them as a policy matter. The same appears to be true for Warning Letters and Public Dispositions which, as used in limited circumstances by COIB, we also do not oppose as a policy matter.

New York City Conflicts of Interest Board

Notice of Adoption of Final Rules

NOTICE IS HEREBY GIVEN PURSUANT TO THE AUTHORITY VESTED IN THE NEW YORK CITY CONFLICTS OF INTEREST BOARD by Sections 1043 and 2603(a) of the City Charter that the Conflicts of Interest Board has repealed and re-promulgated Chapter 2 of the Rules of the Board, which contains the Board’s procedures for enforcement actions commenced pursuant to Section 2603(h) of the City Charter.

The proposed Rules were published in the City Record on June 25, 2019, and a public hearing was held on July 25, 2019. After consideration of the testimony and written comments received, the Conflicts of Interest Board now adopts the following Rules.

STATEMENT OF BASIS AND PURPOSE

Overview

The Board ~~is proposing that~~ has repealed and re-promulgated Chapter 2 of the Rules of the Board (“Procedural Rules for Hearings”), which contains the Board’s procedures for enforcement actions commenced pursuant to Charter § 2603(h), ~~be repealed and re-promulgated.~~

As a result of the work of the Charter Revision Commission (“Commission”) in the late 1980s, the Conflicts of Interest Board (“Board”) was created to replace the Board of Ethics, an agency that had the power to issue advice but not to prosecute those who failed to comply with the ethics code. Recognizing that “the lack of enforcement power in the Board of Ethics was a significant flaw in the law,” the Commission proposed, and the City’s voters approved, the creation of a new Board with the power to adjudicate alleged violations of the conflicts of interest law. Volume II, Report of the New York City Charter Revision Commission, December 1986 – November 1988, at p. 163.

Shortly thereafter, the Board promulgated ~~the existing version of~~ Chapter 2 to establish a structure for implementing its new enforcement process. In the more than two decades since, the Board has gained substantial experience adjudicating allegations of Chapter 68 violations. In doing so, the Board has learned which provisions of the prior version of Chapter 2 ~~work-worked~~ well,

which ~~do~~did not, and which could benefit from clarification. Over the years, the Board has also utilized additional procedures to fill in the gaps left by ~~the existing~~the prior rules. The Board has comprehensively revised~~proposes that~~ Chapter 2 ~~be comprehensively revised~~ both to reflect its current enforcement process and to improve, where needed, various aspects of that process.

The Board's ~~proposed~~ procedural rules are designed to ensure that the subject of an enforcement action – the “respondent” – is afforded a full and fair opportunity to be heard by the Board. The first step in ensuring that a respondent has an opportunity to be heard by the Board is for the respondent to be able to understand what to expect during the enforcement process. When the Commission proposed creating a Board having rulemaking authority, it stated that the Board's promulgated rules “may include rules necessary to assist members of the public and public servants to participate in the board's processes.” Volume II, Report of the New York City Charter Revision Commission, December 1986 – November 1988, at p. 156. ~~The Board proposes this~~This revised version of Chapter 2 serves as a “plain language” guide to help respondents navigate that process, especially because many respondents represent themselves *pro se* before the Board and the confidentiality restrictions of Chapter 68 shield much of the Board's process from public view. Furthermore, because the Board's enforcement process has developed beyond the ~~existing~~prior procedural rules, the proposed rules ~~would~~ codify the Board's current practice, thus providing more comprehensive guidance to respondents.

The ~~proposed~~ revisions to Chapter 2 ~~would~~ provide clarity around three main topics: (i) the two-phase enforcement process; (ii) hearings; and (iii) settlements. As provided for in Charter § 2603(h), respondents have two opportunities to respond to and resolve charges brought by the Board: first, through an informal proceeding; and then, if charges are not resolved during that informal phase, through a formal proceeding. The ~~proposed new~~revisions to Chapter 2 ~~would~~

codify this two-phase approach by creating separate sections to address each type of proceeding. With regard to formal proceedings, the Board, like most City agencies, has come to rely exclusively on the expertise of professional Administrative Law Judges at the New York City Office of Administrative Trials and Hearings (“OATH”) to hold adjudicatory hearings. The Board ~~proposes revising~~revised Chapter 2 to reflect this practice and to eliminate references to hearings held by the Board or a Board Member.

Recognizing that the majority of respondents choose to forgo a hearing and resolve their enforcement actions by settlement agreement, the Board also ~~proposes revising~~revised Chapter 2 to explain more fully the settlement process. While the ~~existing prior~~ rules ~~provide~~provided for “disposition by agreement,” the Board’s enforcement attorneys frequently ~~must~~had to explain the specific requirements of the Board’s settlement process to respondents. The revised rules ~~would~~ provide more detail concerning the requirements for settlement agreements and the process by which such agreements are approved by the Board.

Finally, the ~~proposed Board has revised version of~~ Chapter 2 ~~would to~~ eliminates references to “§ 12-110 of the Administrative Code” (the section that constitutes the Annual Disclosure Law) because the Board has a separate set of procedures for enforcement of this law.

~~Proposed §~~Section 2-02 Informal Proceedings

~~Proposed §~~Section 2-02 ~~would explain~~explains the Board’s informal proceedings. During this phase, a respondent has the opportunity to respond to the Board in writing and to conclude the enforcement action through dismissal or settlement without going through the formalities of an adjudicatory hearing. If the enforcement action is not concluded during this phase, the respondent will have another opportunity to do so through the hearing process. ~~Proposed~~ Board Rules § 2-02

~~would identify~~identifies the steps that take place between the Board's initial determination of probable cause and, if necessary, the Board's decision to proceed to a hearing at OATH.

Pursuant to Charter § 2603(h)(1), when the Board determines that there is probable cause to believe that an individual or organization under its jurisdiction has violated an applicable law (see ~~proposed~~ Board Rules § 2-01(a)), the Board commences an enforcement action by sending the respondent a Notice of Initial Determination of Probable Cause ("Notice"). See ~~Proposed~~ Board Rules § 2-02(a). Alternatively, if the Board determines that there is insufficient evidence to support an initial determination of probable cause, or if the violation is minor, or if there is some other mitigating or extenuating factor, the Board could issue a confidential letter stating the alleged facts and advising the recipient about the relevant provisions of the applicable law.

After the Board commences an enforcement action by sending the Notice, the respondent may submit a response to the Board. ~~Proposed~~ Board Rules § 2-02(b) ~~would clarify~~clarifies that the response must be submitted in writing for the Board's review. The response is an opportunity for the respondent to demonstrate why the Board should reconsider its initial determination of probable cause. If the respondent believes that the facts alleged in the Notice are incorrect, incomplete, or need clarification, the respondent may submit a response, including supporting evidence, to explain those circumstances. Similarly, if the respondent believes that the Board has misapplied the applicable law to the alleged facts, the respondent can present those arguments in a response. ~~Proposed~~ Board Rules § 2-02(b)(3)(i) ~~would explain~~explains that the Board thoroughly reviews all information and arguments in a response to determine whether any or all of the violations alleged in the Notice should be dismissed. However, if a respondent provides no new information or legal arguments to the Board, there would be nothing for the Board to reconsider

and the Board's initial determination of probable cause would be deemed sustained. See ~~Proposed~~ Board Rules § 2-02(b)(3)(ii).

After receiving the Notice, respondents occasionally request that the Board provide to them evidence of the facts upon which the Board relied in making its initial determination of probable cause. Because the Board has learned that discovery is better handled under the supervision of an OATH Administrative Law Judge ("ALJ"), ~~proposed~~ Board Rules § 2-02(b)(1) ~~would inform~~ informs respondents that discovery is not available during informal proceedings but rather should be sought after the commencement of formal proceedings at OATH.

Pursuant to Charter § 2603(h)(1), the Board is required to give the respondent a reasonable amount of time to respond to the Notice. ~~Proposed~~ Board Rules § 2-02(b) ~~would specify~~ specifies the prescribed time within which a respondent ~~could~~ may submit a response, both to reflect the Board's current practice and to establish a process by which the respondent may seek an extension of that deadline. Under ~~existing~~ prior Board Rules §§ 2-01(a) and 2-05(e), the respondent ~~has had~~ has fifteen days from the date of service, or twenty days if service was by mail, to respond to the Notice. Because the Notice is always served by first-class mail, ~~proposed~~ Board Rules § 2-02(b)(1) ~~would clarify~~ clarifies that the respondent has twenty days from the date of service to respond to the Notice.

Upon receiving the Notice, many respondents request an extension of the twenty-day deadline, which the Board generally grants, to pursue settlement discussions or to give the respondent more time to prepare a response. ~~Proposed~~ Board Rules § 2-02(b)(2) ~~would set~~ sets parameters for requesting and granting extensions and ~~establish~~ establishes specific time limits for those extensions. These specific time limits ~~would~~ both give respondents adequate time to respond and prevent enforcement actions from languishing; if the Board does not receive a written response

or a request for an extension within the prescribed time, the Board's initial determination of probable cause would be deemed sustained pursuant to ~~proposed~~ Board Rules § 2-02(b)(3)(ii).

Pursuant to Charter § 2603(h)(2), if the Board sustains its initial determination of probable cause concerning any of the violations alleged in the Notice, the Board proceeds to a hearing or, if the respondent is still employed by the agency where the alleged violation(s) occurred and is entitled to disciplinary rights, the Board refers the matter to the respondent's City agency. ~~Proposed~~ Board Rules § 2-02(c) ~~would explain~~explains the process by which the Board refers the respondent's alleged violations to his or her City agency and ~~would clarify~~clarifies that, even if a matter has been referred to such agency, the Board retains jurisdiction over the enforcement action and may still proceed to a hearing, as contemplated by Charter § 2603(h)(6), should the agency decline to take disciplinary action or if the Board is unable to resolve the matter by a joint settlement with the respondent and agency.

Rather than proceeding to a hearing, the respondent may choose to resolve the Board's enforcement action through settlement. While ~~existing—prior~~ Board Rules § 2-05(h) ~~provides~~provided for "disposition by agreement," ~~this current provision offers~~the rules offered limited guidance to respondents about the contents of such agreements or the settlement process generally. ~~Proposed~~ Board Rules § 2-02(f) ~~would address~~addresses the entire settlement process by articulating the requirements and procedures developed by the Board for the negotiation and approval of settlements.

A settlement agreement with the Board could take the form of either a Public Disposition or a Public Warning Letter. While the majority of enforcement actions are settled with a Public Disposition, the Board could offer to settle a matter with a Public Warning Letter under limited circumstances, such as when mitigating factors are present. For each form of settlement agreement,

the Board ~~would continue~~continues to require that the agreement contain certain information. See ~~Proposed~~ Board Rules § 2-02(f)(1). Just as Charter § 2603(h)(4) requires all Board orders be made public as the final disposition in an enforcement action, the Board likewise ~~would~~ ~~continue~~continues to require that all settlement agreements be made public, as a means for educating other City employees about the Board's interpretation of the applicable law. See ~~Proposed~~ Board Rules § 2-02(f)(4)(i).

As is the Board's current practice, a ~~proposed~~ settlement agreement ~~would-is~~ not ~~be~~ final until all monetary penalties due to the Board have been paid and the agreement is signed by the Board. Because many settlement agreements include the payment of a monetary penalty to the Board, ~~proposed~~ Board Rules § 2-02(f)(3) ~~would codify~~codifies the Board's practice with regard to the timing and handling of such payments, and ~~proposed~~ Board Rules § 2-02(f)(4) ~~would~~ ~~clarify~~clarifies that a proposed settlement agreement would not be presented to the Board for final approval until all monetary penalties due to the Board have been paid. When the Board reviews a proposed settlement, there is a possibility that the Board might request a different penalty or ask to modify language in the agreement. Thus, ~~proposed~~ Board Rules § 2-02(f)(4) ~~would~~ ~~inform~~informs respondents that a proposed settlement agreement is not final until it is approved and signed by the Board.

When negotiating a settlement, respondents occasionally request that their employing City agency be joined as a party to avoid possible future disciplinary action by their agency for the same conduct. ~~Proposed~~ Board Rules § 2-02(f)(2) ~~would inform~~informs respondents that, if the respondent submits a waiver of confidentiality, the Board may speak to such agency about a joint settlement.

~~Proposed §~~Section 2-03 Formal Proceedings

~~Proposed §~~Section 2-03 ~~would explain~~explains the Board’s formal proceedings. During this phase, the respondent ~~would have~~has an opportunity to respond to the Board’s charges and present evidence at an adjudicatory hearing before an OATH ALJ. As is OATH’s practice, the ALJ would issue a report to the Board, and the Board would review the report, along with the evidentiary record, to make its final determination about whether the respondent violated the applicable law. ~~Proposed~~ Board Rules in § 2-03 ~~would address~~addresses the steps that take place between commencement of formal proceedings at OATH and final action by the Board.

Pursuant to Charter § 2603(h)(2), the Board “shall hold or direct a hearing to be held” to determine whether the respondent has violated the applicable law. When the ~~existing prior~~ rules were drafted, the Board envisioned that hearings might be conducted by the Board, a member of the Board, or OATH. However, neither the Board nor any Board member has ever held a hearing. Instead, all such hearings are conducted by the OATH Trial Division. OATH provides an impartial forum and is staffed by professional ALJs who regularly handle adjudicatory proceedings for many City agencies. ~~Proposed~~ Board Rules § 2-03(a) ~~would codify~~codifies the Board’s current practice of hearings being conducted at OATH in accordance with OATH’s Rules of Practice, which are set forth in Title 48 of the Rules of the City of New York (“OATH Rules”). Once the Board commences formal proceedings, the OATH Rules govern the hearing process.

Because OATH has its own set of procedural rules, ~~these the proposed~~ Board Rules ~~would~~ eliminate existing provisions that are redundant of the OATH Rules, except for a few provisions to provide additional guidance to respondents or impose requirements beyond the OATH Rules. To ensure that respondents understand when the Board has commenced formal proceedings, ~~proposed~~ Board Rules § 2-03(b) ~~would identify~~identifies the documents that are served and filed

by the Board, as required by the OATH Rules, and ~~would specify~~specifies the precise method of service for those documents. Because the Board tries to coordinate with respondents about dates for a settlement conference and a hearing before filing a Petition at OATH, ~~proposed~~ Board Rules § 2-03(b)(1) ~~would provide~~provides context to this request. Under the OATH Rules, the respondent may submit an answer to the Board's charges in the Petition. Expanding on the OATH Rules, ~~proposed~~ Board Rules § 2-03(d) ~~would retain~~retains and ~~expand~~expands upon ~~existing prior~~ Board Rules § 2-02(d), ~~which advises~~ by advising respondents about the information they may want to include in an answer and ~~requires~~requiring them to provide their contact information. Because this topic is not addressed by the OATH Rules, ~~proposed~~ Board Rules § 2-03(f) ~~would~~ ~~codify~~codifies the Board's existing burden of proof standard for finding that the respondent violated the applicable law. Additionally, ~~proposed~~ Board Rules § 2-03(f) ~~would provide~~provides guidance to respondents concerning the trial sequence.

After a hearing conducted at OATH, the ALJ would issue a report of recommended findings of fact and conclusions of law and recommended disposition for the enforcement action, which may include imposing a penalty or dismissing some or all of the Board's charges. See Proposed Board Rules 2-03(g). Under ~~existing prior~~ Board Rules § 2-04(a), the respondent and the enforcement attorney ~~have had~~ ten days from the date of service of the report to submit a comment to the Board. In practice, the respondent often needs more than ten days and the enforcement attorney may wait to see what, if anything, the respondent submits before making a submission. ~~Proposed~~ Board Rules § 2-03(h) ~~would revise~~revises the prescribed time within which to submit a comment to the Board and ~~would establish~~establishes a fairer process by giving the parties both a longer amount of time to submit a comment to the Board as well as an opportunity to respond to the comment submitted by the opposing party.

~~Proposed~~ Board Rules § 2-03(i) ~~would codify~~codifies the Board's burden of proof standard and ~~identify~~identifies the specific materials reviewed by the Board in making its final determination about whether the respondent violated the applicable law. If the Board determines that the respondent has committed a violation, the Board issues an order to the respondent pursuant to Charter § 2603(h)(3). ~~Proposed~~ Board Rules § 2-03(j)(1) ~~would provide~~provides a more concise and plain language description of the content of such orders, and ~~make~~makes clear that all Board orders are made public.

Furthermore, ~~proposed~~ Board Rules §§ 2-03(g) and 2-03(j)(2) ~~would~~ make clear that, while the OATH report is confidential at the time it is issued, the report may become public as part of the Board's final order. Finally, ~~proposed~~ Board Rules § 2-03(j)(3)-(4) ~~would codify~~codifies the method of service for Board orders and the Board's practice of setting a thirty-day deadline from the date of service for the payment of a monetary penalty imposed in a Board order. Alternatively, if the Board determines, after a hearing, that there is not sufficient evidence to determine that the respondent violated the applicable law, ~~proposed~~ Board Rules § 2-03(k) ~~would explain~~explains that the respondent will be sent the Board's final decision in writing and that all materials remain confidential.

Throughout the formal proceedings phase, the attorneys in the Board's advice unit act as counsel to the Board when the Board reviews the materials and makes its final determination. Thus, ~~proposed~~ Board Rules § 2-02(c) ~~would retain~~retains the practice and policy embodied by ~~existing~~prior Board Rules § 2-05(g) by prohibiting *ex parte* communications between the enforcement attorney and the Board's advice attorneys regarding the merits of the enforcement action after formal proceedings have been commenced.

Text of ~~Proposed~~ Board Rules

New material is underlined.

[Deleted material is in brackets.]

Section 1. Chapter 2 of Title 53 of the Rules of the City of New York is REPEALED and a new Chapter 2 is re-promulgated to read as follow:

Chapter 2: Procedural Rules for Enforcement Actions

§ 2-01 Applicability and Definitions.

(a) Applicability.

This chapter establishes the procedural rules for enforcement actions brought pursuant to Charter § 2603(h) to address alleged violations of:

- (1) Chapter 68 of the City Charter (the Conflicts of Interest Law);
- (2) § 3-224 through § 3-228 of the Administrative Code (the Lobbyist Gift Law);
- (3) § 3-901 through § 3-907 of the Administrative Code (the Affiliated Not-for-Profits Law); and
- (4) § 3-1101 through § 3-1107 of the Administrative Code (the Legal Defense Trusts Law).

(b) Definitions.

“Board” means the Conflicts of Interest Board.

“Board Rules” means the rules of the Conflicts of Interest Board, as set forth in Title 53 of the Rules of the City of New York.

“Day” means a calendar day. When the last day of a time period is a Saturday, Sunday, or public holiday, the time period will run through the end of the next business day.

“Enforcement attorney” means an attorney prosecuting an enforcement action on behalf of the Board.

“OATH” means the New York City Office of Administrative Trials and Hearings.

“OATH Rules” means OATH’s Rules of Practice, as set forth in Title 48 of the Rules of the City of New York.

“Respondent” means a public servant or former public servant; a lobbyist or any other person required to be listed on a statement of registration pursuant to Administrative Code § 3-213(c)(1); an organization affiliated with an elected official or an agent of an elected official, as defined by Administrative Code § 3-901; or a legal defense trust, trustee, or beneficiary, as defined by Administrative Code § 3-1101, who has been served a Notice of Initial Determination of Probable Cause.

§ 2-02 Informal Proceedings.

(a) Notice of Initial Determination of Probable Cause.

For the purposes of Charter § 2603(h)(1), the Board will commence an enforcement action by serving a Notice of Initial Determination of Probable Cause by first class mail to the respondent’s last known residential address or actual place of business.

(b) Response to the Notice of Initial Determination of Probable Cause.

(1) For the purposes of Charter § 2603(h)(1), the respondent has twenty (20) days from the date of service to submit a written response to the Notice of Initial Determination of Probable Cause (“Notice”) or request an extension. The response is an opportunity to explain, rebut, or provide information concerning the factual or legal allegations in the

Notice. The Board will not consider requests for discovery of evidence during informal proceedings.

(2) Upon oral or written request within twenty (20) days from the date of service of the Notice, the respondent will be granted a thirty- (30-) day extension within which to submit a written response. Upon oral or written request made prior to the expiration of the first extension, the respondent may be granted a second thirty- (30-) day extension for good cause shown, including, but not limited to, ongoing settlement negotiations. Any further extensions must be requested in writing to the Board and will be granted only in exigent circumstances.

(3) For the purposes of Charter § 2603(h)(2):

(i) If the respondent submits a substantive written response to the Notice, the Board will review the response to determine whether there remains probable cause to believe that any alleged violation occurred and will either dismiss the enforcement action or sustain its initial determination of probable cause in whole or in part.

(ii) If the respondent does not submit a written response to the Notice or submits only a general denial of the allegations in the Notice, the Board's initial determination of probable cause will be deemed sustained.

(c) Referral to agency.

If the Board sustains its initial determination of probable cause against a respondent who is entitled to disciplinary rights as described in Charter § 2603(h)(2), the Board will notify the respondent's

employing City agency in writing of the alleged facts and violations. After such a referral, the Board retains separate and continuing jurisdiction over the enforcement action.

- (1) If the agency does not pursue disciplinary action against the respondent, the Board will commence formal proceedings against the respondent.
- (2) If the agency pursues disciplinary action against the respondent, the Board may resolve the enforcement action by a joint settlement agreement with the respondent and agency or commence formal proceedings against the respondent.

(d) Representation by an attorney or other person.

- (1) If the respondent chooses to be represented by an attorney or any other person, the representative appearing for the respondent must submit a written and signed Notice of Appearance to the Board. The appearance of a member in good standing of the bar of a court of general jurisdiction of any state or territory of the United States will be indicated by the designation "Attorney for (person represented)." The appearance of any other person will be indicated by the designation "Representative for (person represented)." The Board will not accept a response from or discuss the details of an enforcement action with any attorney or other person who has not submitted a Notice of Appearance.
- (2) To withdraw from representation, the representative must submit a written notice of withdrawal to the Board, signed by the respondent or otherwise explaining the reason for withdrawal. An attorney who has submitted a Notice of Appearance may withdraw from representation only with consent of the respondent or when other cause exists, as delineated in the applicable provisions of the New York Rules of Professional Conduct.

(3) A Notice of Appearance, withdrawal or substitution may be submitted to the Board at any time prior to commencement of formal proceedings. After the service of the Notice of Petition and Petition pursuant to Board Rules § 2-03(b)(1), the OATH Rules govern the procedures for a Notice of Appearance, withdrawal or substitution.

(e) Stay of an enforcement action.

To obtain a stay of an enforcement action prior to commencement of formal proceedings, the respondent must submit a written request to the Board for its review and approval. After the service of the Notice of Petition and Petition pursuant to Board Rules § 2-03(b)(1), the OATH Rules govern the procedures for a stay.

(f) Settlement.

(1) At any time after the service of the Notice of Initial Determination of Probable Cause, an enforcement action may be resolved by settlement agreement in the form of a Public Disposition or Public Warning Letter.

(i) A Public Disposition must include an admission of the relevant facts; an acknowledgment that the admitted conduct violated a specific provision of the Conflicts of Interest Law, the Lobbyist Gift Law, the Affiliated Not-for-Profits Law, or the Legal Defense Trusts Law; and a penalty that addresses the admitted conduct.

(ii) A Public Warning Letter must include a statement of relevant facts, and a description of each violation of a specific provision of the Conflicts of

Interest Law, the Lobbyist Gift Law, the Affiliated Not-for-Profits Law, or the Legal Defense Trusts Law.

- (2) The language and penalty of the proposed settlement agreement will be negotiated between the enforcement attorney and the respondent or the respondent's representative, if applicable. If the respondent requests that the respondent's employing City agency be a party to the settlement, the respondent must submit a signed waiver of confidentiality to the Board to allow the enforcement attorney to discuss the proposed settlement agreement with such agency.
- (3) If the enforcement attorney and the respondent reach a proposed settlement agreement, it will be reduced to writing and signed by the respondent, the respondent's representative, if applicable, and a representative of the respondent's employing City agency, if applicable. Any monetary penalty to be paid to the Board is due upon signing unless otherwise specified in the proposed settlement agreement. Monetary penalty payments will be held by the Board in escrow until the proposed settlement agreement is fully executed by the Board.
- (4) After receiving the full payment of any monetary penalty to be paid to the Board, the enforcement attorney will present the proposed settlement agreement to the Board for its review and approval.
 - (i) If the Board approves the proposed settlement agreement, the settlement agreement will be signed by the Board Chair. The fully-executed settlement agreement will be made public, but all underlying records, reports, memoranda, and files of the enforcement action will remain confidential in accordance with Charter § 2603(k).

- (ii) If the Board does not approve the proposed settlement agreement, the Board may direct the enforcement attorney to seek modification of the penalty or the language in the settlement agreement. The modified proposed settlement agreement must be reviewed and approved by the Board.

§ 2-03 Formal Proceedings.

(a) Designation of OATH.

For the purposes of Charter § 2603(h)(2), and in accordance with Charter § 1048, the Board designates OATH to conduct hearings in accordance with the OATH Rules, except as otherwise provided by these rules.

(b) Commencement of formal proceedings.

- (1) The Board will commence formal proceedings at OATH by serving a Notice of Petition and Petition by certified mail, return receipt requested, and first class mail, to the respondent's last known residential address or actual place of business and to the respondent's representative, if applicable. After service, the enforcement attorney will file the Notice of Petition and Petition with OATH and will provide OATH with potential dates for a settlement conference and potential dates for a hearing.
- (2) After the conference and hearing dates have been scheduled at OATH, the enforcement attorney will serve a Notice of Hearing by certified mail, return receipt requested, and first class mail, to the respondent's last known residential address or actual place of business and to the respondent's representative, if applicable.

(c) Ex Parte communications with the Board.

(1) After service of the Notice of Petition and Petition pursuant to Board Rules § 2-03(b)(1), any Board attorney involved in the prosecution of the enforcement action may not communicate *ex parte* with any member of the Board or any attorney serving as counsel to the Board concerning the merits of the enforcement action, except as provided in paragraph (2) of this subdivision.

(2) An enforcement attorney may communicate *ex parte* with members of the Board or an attorney serving as counsel to the Board with respect to ministerial matters involving the enforcement action; on consent of the respondent or respondent's representative; or if deemed necessary by the Board or by an attorney serving as counsel to the Board.

(d) Answer.

The respondent may serve and file a written answer to the Petition in accordance with the OATH Rules. The answer may contain specific responses, by admission, denial, or otherwise, to each allegation of the Petition and assert all affirmative defenses, if any. The respondent may include in the answer matters in mitigation. The answer must contain the full name, address, telephone number, and email address of the respondent. If the respondent is represented, the representative's name, address, telephone number and email address must also appear on the answer. The answer must be signed by the respondent or respondent's representative.

(e) Settlement.

At the OATH settlement conference, an enforcement action may be resolved by settlement agreement pursuant to Board Rules § 2-02(f).

(f) Hearing.

- (1) The enforcement attorney will have the burden of proof by a preponderance of the evidence.
- (2) The enforcement attorney will make an opening statement first, after which the respondent may make an opening statement.
- (3) The enforcement attorney will initiate the presentation of evidence. After the enforcement attorney has completed the presentation of the Board's evidence, the respondent may present evidence. The enforcement attorney may present rebuttal evidence.
- (4) The enforcement attorney will make a closing statement first, after which the respondent may make a closing statement.

(g) OATH report.

After a hearing has been conducted, OATH will issue a confidential report of its recommended findings of fact and conclusions of law and its recommended disposition of the enforcement action. OATH will send the report, along with the original transcript of the hearing and all documents introduced into the record, to the Board for review. OATH will send a copy of the report to the enforcement attorney and the respondent or respondent's representative, if applicable.

(h) Comment on OATH report.

Within twenty (20) days from the date of the OATH report, each party may submit a comment to the Board to explain, rebut, or provide information concerning OATH's recommended findings of

fact, conclusions of law, and disposition. If either party submits a comment, the opposing party may submit to the Board a response to such comment within thirty (30) days from the date of the OATH report. Copies of all such submissions must be shared with the opposing party. The Board will not consider new evidence submitted in a comment or in a response to a comment.

(i) Final review by the Board.

For the purposes of Charter § 2603(h)(3), the Board will review the OATH report, along with the original transcript of the hearing and all documents introduced into the record, and any comments and responses to comments submitted to the Board pursuant to Board Rules § 2-03(h), to determine whether it has been proven by a preponderance of the evidence that the respondent violated a provision of the Conflicts of Interest Law, the Lobbyist Gift Law, the Affiliated Not-for-Profits Law, or the Legal Defense Trusts Law. In accordance with Board Rules § 2-03(c), any Board attorney involved in the prosecution of the enforcement action will not participate in the Board's final review.

(j) Board order finding a violation.

- (1) If the Board determines that it has been proven by a preponderance of the evidence that the respondent violated a provision of the Conflicts of Interest Law, the Lobbyist Gift Law, the Affiliated Not-for-Profits Law, or the Legal Defense Trusts Law, the Board will issue an order stating its final findings of fact and conclusions of law and imposing a penalty, except, if the respondent is a current Member or employee of the New York City Council, the Board will issue an order stating its final findings of fact and conclusions of law and recommending a penalty to the New York City Council. The

order will include notice of the respondent's right to appeal to the New York State Supreme Court.

- (2) All orders of the Board will be made public. The Board may also make the OATH report public as part of its order, but all other underlying records, reports, memoranda, and files will remain confidential in accordance with Charter § 2603(k).
- (3) The order will be sent by first class mail to the respondent's last known residential address or actual place of business and to the respondent's representative, if applicable.
- (4) If the order imposes a monetary penalty, payment is due to the Board within thirty (30) days of the date of service. If the respondent does not pay the full monetary penalty amount, the Board will refer the matter to the New York City Law Department for collection.

(k) Board dismissal.

If the Board determines that it has not been proven by a preponderance of the evidence that the respondent violated any provision of the Conflicts of Interest Law, the Lobbyist Gift Law, the Affiliated Not-for-Profits Law, or the Legal Defense Trusts Law, the Board will issue a written decision that dismisses the enforcement action and states its final findings of fact and conclusions of law. The decision will be sent to the respondent and respondent's representative, if applicable, and will not be made public. All underlying records, reports, memoranda, and files will remain confidential in accordance with Charter § 2603(k).

New York City Conflicts of Interest Board

Notice of Adoption of Final Rules

NOTICE IS HEREBY GIVEN PURSUANT TO THE AUTHORITY VESTED IN THE NEW YORK CITY CONFLICTS OF INTEREST BOARD by Sections 1043 and 2603(a) of the City Charter that the Conflicts of Interest Board has repealed and re-promulgated Chapter 2 of the Rules of the Board, which contains the Board's procedures for enforcement actions commenced pursuant to Section 2603(h) of the City Charter.

The proposed Rules were published in the City Record on June 25, 2019, and a public hearing was held on July 25, 2019. After consideration of the testimony and written comments received, the Conflicts of Interest Board now adopts the following Rules.

STATEMENT OF BASIS AND PURPOSE

Overview

The Board has repealed and re-promulgated Chapter 2 of the Rules of the Board ("Procedural Rules for Hearings"), which contains the Board's procedures for enforcement actions commenced pursuant to Charter § 2603(h).

As a result of the work of the Charter Revision Commission ("Commission") in the late 1980s, the Conflicts of Interest Board ("Board") was created to replace the Board of Ethics, an agency that had the power to issue advice but not to prosecute those who failed to comply with the ethics code. Recognizing that "the lack of enforcement power in the Board of Ethics was a significant flaw in the law," the Commission proposed, and the City's voters approved, the creation of a new Board with the power to adjudicate alleged violations of the conflicts of interest law. Volume II, Report of the New York City Charter Revision Commission, December 1986 – November 1988, at p. 163.

Shortly thereafter, the Board promulgated Chapter 2 to establish a structure for implementing its new enforcement process. In the more than two decades since, the Board has gained substantial experience adjudicating allegations of Chapter 68 violations. In doing so, the Board has learned which provisions of the prior version of Chapter 2 worked well, which did not,

and which could benefit from clarification. Over the years, the Board has also utilized additional procedures to fill in the gaps left by the prior rules. The Board has comprehensively revised Chapter 2 both to reflect its current enforcement process and to improve, where needed, various aspects of that process.

The Board's procedural rules are designed to ensure that the subject of an enforcement action – the “respondent” – is afforded a full and fair opportunity to be heard by the Board. The first step in ensuring that a respondent has an opportunity to be heard by the Board is for the respondent to be able to understand what to expect during the enforcement process. When the Commission proposed creating a Board having rulemaking authority, it stated that the Board's promulgated rules “may include rules necessary to assist members of the public and public servants to participate in the board's processes.” Volume II, Report of the New York City Charter Revision Commission, December 1986 – November 1988, at p. 156. This revised version of Chapter 2 serves as a “plain language” guide to help respondents navigate that process, especially because many respondents represent themselves *pro se* before the Board and the confidentiality restrictions of Chapter 68 shield much of the Board's process from public view. Furthermore, because the Board's enforcement process has developed beyond the prior procedural rules, the proposed rules codify the Board's current practice, thus providing more comprehensive guidance to respondents.

The revisions to Chapter 2 provide clarity around three main topics: (i) the two-phase enforcement process; (ii) hearings; and (iii) settlements. As provided for in Charter § 2603(h), respondents have two opportunities to respond to and resolve charges brought by the Board: first, through an informal proceeding; and then, if charges are not resolved during that informal phase, through a formal proceeding. The revisions to Chapter 2 codify this two-phase approach by creating separate sections to address each type of proceeding. With regard to formal proceedings,

the Board, like most City agencies, has come to rely exclusively on the expertise of professional Administrative Law Judges at the New York City Office of Administrative Trials and Hearings (“OATH”) to hold adjudicatory hearings. The Board revised Chapter 2 to reflect this practice and to eliminate references to hearings held by the Board or a Board Member.

Recognizing that the majority of respondents choose to forgo a hearing and resolve their enforcement actions by settlement agreement, the Board also revised Chapter 2 to explain more fully the settlement process. While the prior rules provided for “disposition by agreement,” the Board’s enforcement attorneys frequently had to explain the specific requirements of the Board’s settlement process to respondents. The revised rules provide more detail concerning the requirements for settlement agreements and the process by which such agreements are approved by the Board.

Finally, the Board has revised Chapter 2 to eliminate references to “§ 12-110 of the Administrative Code” (the section that constitutes the Annual Disclosure Law) because the Board has a separate set of procedures for enforcement of this law.

Section 2-02 Informal Proceedings

Section 2-02 explains the Board’s informal proceedings. During this phase, a respondent has the opportunity to respond to the Board in writing and to conclude the enforcement action through dismissal or settlement without going through the formalities of an adjudicatory hearing. If the enforcement action is not concluded during this phase, the respondent will have another opportunity to do so through the hearing process. Board Rules § 2-02 identifies the steps that take place between the Board’s initial determination of probable cause and, if necessary, the Board’s decision to proceed to a hearing at OATH.

Pursuant to Charter § 2603(h)(1), when the Board determines that there is probable cause to believe that an individual or organization under its jurisdiction has violated an applicable law (see Board Rules § 2-01(a)), the Board commences an enforcement action by sending the respondent a Notice of Initial Determination of Probable Cause (“Notice”). See Board Rules § 2-02(a). Alternatively, if the Board determines that there is insufficient evidence to support an initial determination of probable cause, or if the violation is minor, or if there is some other mitigating or extenuating factor, the Board could issue a confidential letter stating the alleged facts and advising the recipient about the relevant provisions of the applicable law.

After the Board commences an enforcement action by sending the Notice, the respondent may submit a response to the Board. Board Rules § 2-02(b) clarifies that the response must be submitted in writing for the Board’s review. The response is an opportunity for the respondent to demonstrate why the Board should reconsider its initial determination of probable cause. If the respondent believes that the facts alleged in the Notice are incorrect, incomplete, or need clarification, the respondent may submit a response, including supporting evidence, to explain those circumstances. Similarly, if the respondent believes that the Board has misapplied the applicable law to the alleged facts, the respondent can present those arguments in a response. Board Rules § 2-02(b)(3)(i) explains that the Board thoroughly reviews all information and arguments in a response to determine whether any or all of the violations alleged in the Notice should be dismissed. However, if a respondent provides no new information or legal arguments to the Board, there would be nothing for the Board to reconsider and the Board’s initial determination of probable cause would be deemed sustained. See Board Rules § 2-02(b)(3)(ii).

After receiving the Notice, respondents occasionally request that the Board provide to them evidence of the facts upon which the Board relied in making its initial determination of probable

cause. Because the Board has learned that discovery is better handled under the supervision of an OATH Administrative Law Judge (“ALJ”), Board Rules § 2-02(b)(1) informs respondents that discovery is not available during informal proceedings but rather should be sought after the commencement of formal proceedings at OATH.

Pursuant to Charter § 2603(h)(1), the Board is required to give the respondent a reasonable amount of time to respond to the Notice. Board Rules § 2-02(b) specifies the prescribed time within which a respondent may submit a response, both to reflect the Board’s current practice and to establish a process by which the respondent may seek an extension of that deadline. Under prior Board Rules §§ 2-01(a) and 2-05(e), the respondent had fifteen days from the date of service, or twenty days if service was by mail, to respond to the Notice. Because the Notice is always served by first-class mail, Board Rules § 2-02(b)(1) clarifies that the respondent has twenty days from the date of service to respond to the Notice.

Upon receiving the Notice, many respondents request an extension of the twenty-day deadline, which the Board generally grants, to pursue settlement discussions or to give the respondent more time to prepare a response. Board Rules § 2-02(b)(2) sets parameters for requesting and granting extensions and establishes specific time limits for those extensions. These specific time limits both give respondents adequate time to respond and prevent enforcement actions from languishing; if the Board does not receive a written response or a request for an extension within the prescribed time, the Board’s initial determination of probable cause would be deemed sustained pursuant to Board Rules § 2-02(b)(3)(ii).

Pursuant to Charter § 2603(h)(2), if the Board sustains its initial determination of probable cause concerning any of the violations alleged in the Notice, the Board proceeds to a hearing or, if the respondent is still employed by the agency where the alleged violation(s) occurred and is

entitled to disciplinary rights, the Board refers the matter to the respondent's City agency. Board Rules § 2-02(c) explains the process by which the Board refers the respondent's alleged violations to his or her City agency and clarifies that, even if a matter has been referred to such agency, the Board retains jurisdiction over the enforcement action and may still proceed to a hearing, as contemplated by Charter § 2603(h)(6), should the agency decline to take disciplinary action or if the Board is unable to resolve the matter by a joint settlement with the respondent and agency.

Rather than proceeding to a hearing, the respondent may choose to resolve the Board's enforcement action through settlement. While prior Board Rules § 2-05(h) provided for "disposition by agreement," the rules offered limited guidance to respondents about the contents of such agreements or the settlement process generally. Board Rules § 2-02(f) addresses the entire settlement process by articulating the requirements and procedures developed by the Board for the negotiation and approval of settlements.

A settlement agreement with the Board could take the form of either a Public Disposition or a Public Warning Letter. While the majority of enforcement actions are settled with a Public Disposition, the Board could offer to settle a matter with a Public Warning Letter under limited circumstances, such as when mitigating factors are present. For each form of settlement agreement, the Board continues to require that the agreement contain certain information. See Board Rules § 2-02(f)(1). Just as Charter § 2603(h)(4) requires all Board orders be made public as the final disposition in an enforcement action, the Board likewise continues to require that all settlement agreements be made public, as a means for educating other City employees about the Board's interpretation of the applicable law. See Board Rules § 2-02(f)(4)(i).

As is the Board's current practice, a settlement agreement is not final until all monetary penalties due to the Board have been paid and the agreement is signed by the Board. Because many

settlement agreements include the payment of a monetary penalty to the Board, Board Rules § 2-02(f)(3) codifies the Board's practice with regard to the timing and handling of such payments, and Board Rules § 2-02(f)(4) clarifies that a proposed settlement agreement would not be presented to the Board for final approval until all monetary penalties due to the Board have been paid. When the Board reviews a proposed settlement, there is a possibility that the Board might request a different penalty or ask to modify language in the agreement. Thus, Board Rules § 2-02(f)(4) informs respondents that a proposed settlement agreement is not final until it is approved and signed by the Board.

When negotiating a settlement, respondents occasionally request that their employing City agency be joined as a party to avoid possible future disciplinary action by their agency for the same conduct. Board Rules § 2-02(f)(2) informs respondents that, if the respondent submits a waiver of confidentiality, the Board may speak to such agency about a joint settlement.

Section 2-03 Formal Proceedings

Section 2-03 explains the Board's formal proceedings. During this phase, the respondent has an opportunity to respond to the Board's charges and present evidence at an adjudicatory hearing before an OATH ALJ. As is OATH's practice, the ALJ would issue a report to the Board, and the Board would review the report, along with the evidentiary record, to make its final determination about whether the respondent violated the applicable law. Board Rules in § 2-03 addresses the steps that take place between commencement of formal proceedings at OATH and final action by the Board.

Pursuant to Charter § 2603(h)(2), the Board "shall hold or direct a hearing to be held" to determine whether the respondent has violated the applicable law. When the prior rules were

drafted, the Board envisioned that hearings might be conducted by the Board, a member of the Board, or OATH. However, neither the Board nor any Board member has ever held a hearing. Instead, all such hearings are conducted by the OATH Trial Division. OATH provides an impartial forum and is staffed by professional ALJs who regularly handle adjudicatory proceedings for many City agencies. Board Rules § 2-03(a) codifies the Board’s current practice of hearings being conducted at OATH in accordance with OATH’s Rules of Practice, which are set forth in Title 48 of the Rules of the City of New York (“OATH Rules”). Once the Board commences formal proceedings, the OATH Rules govern the hearing process.

Because OATH has its own set of procedural rules, the Board Rules eliminate existing provisions that are redundant of the OATH Rules, except for a few provisions to provide additional guidance to respondents or impose requirements beyond the OATH Rules. To ensure that respondents understand when the Board has commenced formal proceedings, Board Rules § 2-03(b) identifies the documents that are served and filed by the Board, as required by the OATH Rules, and specifies the precise method of service for those documents. Because the Board tries to coordinate with respondents about dates for a settlement conference and a hearing before filing a Petition at OATH, Board Rules § 2-03(b)(1) provides context to this request. Under the OATH Rules, the respondent may submit an answer to the Board’s charges in the Petition. Expanding on the OATH Rules, Board Rules § 2-03(d) retains and expands upon prior Board Rules § 2-02(d) by advising respondents about the information they may want to include in an answer and requiring them to provide their contact information. Because this topic is not addressed by the OATH Rules, Board Rules § 2-03(f) codifies the Board’s existing burden of proof standard for finding that the respondent violated the applicable law. Additionally, Board Rules § 2-03(f) provides guidance to respondents concerning the trial sequence.

After a hearing conducted at OATH, the ALJ would issue a report of recommended findings of fact and conclusions of law and recommended disposition for the enforcement action, which may include imposing a penalty or dismissing some or all of the Board's charges. See Board Rules 2-03(g). Under prior Board Rules § 2-04(a), the respondent and the enforcement attorney had ten days from the date of service of the report to submit a comment to the Board. In practice, the respondent often needs more than ten days and the enforcement attorney may wait to see what, if anything, the respondent submits before making a submission. Board Rules § 2-03(h) revises the prescribed time within which to submit a comment to the Board and establishes a fairer process by giving the parties both a longer amount of time to submit a comment to the Board as well as an opportunity to respond to the comment submitted by the opposing party.

Board Rules § 2-03(i) codifies the Board's burden of proof standard and identifies the specific materials reviewed by the Board in making its final determination about whether the respondent violated the applicable law. If the Board determines that the respondent has committed a violation, the Board issues an order to the respondent pursuant to Charter § 2603(h)(3). Board Rules § 2-03(j)(1) provides a more concise and plain language description of the content of such orders, and makes clear that all Board orders are made public.

Furthermore, Board Rules §§ 2-03(g) and 2-03(j)(2) make clear that, while the OATH report is confidential at the time it is issued, the report may become public as part of the Board's final order. Finally, Board Rules § 2-03(j)(3)-(4) codifies the method of service for Board orders and the Board's practice of setting a thirty-day deadline from the date of service for the payment of a monetary penalty imposed in a Board order. Alternatively, if the Board determines, after a hearing, that there is not sufficient evidence to determine that the respondent violated the

applicable law, Board Rules § 2-03(k) explains that the respondent will be sent the Board's final decision in writing and that all materials remain confidential.

Throughout the formal proceedings phase, the attorneys in the Board's advice unit act as counsel to the Board when the Board reviews the materials and makes its final determination. Thus, Board Rules § 2-02(c) retains the practice and policy embodied by prior Board Rules § 2-05(g) by prohibiting *ex parte* communications between the enforcement attorney and the Board's advice attorneys regarding the merits of the enforcement action after formal proceedings have been commenced.

Text of Board Rules

New material is underlined.

[Deleted material is in brackets.]

Section 1. Chapter 2 of Title 53 of the Rules of the City of New York is REPEALED and a new Chapter 2 is re-promulgated to read as follow:

Chapter 2: Procedural Rules for Enforcement Actions

§ 2-01 Applicability and Definitions.

(a) Applicability.

This chapter establishes the procedural rules for enforcement actions brought pursuant to Charter § 2603(h) to address alleged violations of:

- (1) Chapter 68 of the City Charter (the Conflicts of Interest Law);
- (2) § 3-224 through § 3-228 of the Administrative Code (the Lobbyist Gift Law);
- (3) § 3-901 through § 3-907 of the Administrative Code (the Affiliated Not-for-Profits Law); and

(4) § 3-1101 through § 3-1107 of the Administrative Code (the Legal Defense Trusts Law).

(b) Definitions.

“Board” means the Conflicts of Interest Board.

“Board Rules” means the rules of the Conflicts of Interest Board, as set forth in Title 53 of the Rules of the City of New York.

“Day” means a calendar day. When the last day of a time period is a Saturday, Sunday, or public holiday, the time period will run through the end of the next business day.

“Enforcement attorney” means an attorney prosecuting an enforcement action on behalf of the Board.

“OATH” means the New York City Office of Administrative Trials and Hearings.

“OATH Rules” means OATH’s Rules of Practice, as set forth in Title 48 of the Rules of the City of New York.

“Respondent” means a public servant or former public servant; a lobbyist or any other person required to be listed on a statement of registration pursuant to Administrative Code § 3-213(c)(1); an organization affiliated with an elected official or an agent of an elected official, as defined by Administrative Code § 3-901; or a legal defense trust, trustee, or beneficiary, as defined by Administrative Code § 3-1101, who has been served a Notice of Initial Determination of Probable Cause.

§ 2-02 Informal Proceedings.

(a) Notice of Initial Determination of Probable Cause.

For the purposes of Charter § 2603(h)(1), the Board will commence an enforcement action by serving a Notice of Initial Determination of Probable Cause by first class mail to the respondent's last known residential address or actual place of business.

(b) Response to the Notice of Initial Determination of Probable Cause.

- (1) For the purposes of Charter § 2603(h)(1), the respondent has twenty (20) days from the date of service to submit a written response to the Notice of Initial Determination of Probable Cause (“Notice”) or request an extension. The response is an opportunity to explain, rebut, or provide information concerning the factual or legal allegations in the Notice. The Board will not consider requests for discovery of evidence during informal proceedings.
- (2) Upon oral or written request within twenty (20) days from the date of service of the Notice, the respondent will be granted a thirty- (30-) day extension within which to submit a written response. Upon oral or written request made prior to the expiration of the first extension, the respondent may be granted a second thirty- (30-) day extension for good cause shown, including, but not limited to, ongoing settlement negotiations. Any further extensions must be requested in writing to the Board and will be granted only in exigent circumstances.
- (3) For the purposes of Charter § 2603(h)(2):

 - (i) If the respondent submits a substantive written response to the Notice, the Board will review the response to determine whether there remains probable cause to believe that any alleged violation occurred and will either dismiss

the enforcement action or sustain its initial determination of probable cause in whole or in part.

- (ii) If the respondent does not submit a written response to the Notice or submits only a general denial of the allegations in the Notice, the Board's initial determination of probable cause will be deemed sustained.

(c) Referral to agency.

If the Board sustains its initial determination of probable cause against a respondent who is entitled to disciplinary rights as described in Charter § 2603(h)(2), the Board will notify the respondent's employing City agency in writing of the alleged facts and violations. After such a referral, the Board retains separate and continuing jurisdiction over the enforcement action.

- (1) If the agency does not pursue disciplinary action against the respondent, the Board will commence formal proceedings against the respondent.
- (2) If the agency pursues disciplinary action against the respondent, the Board may resolve the enforcement action by a joint settlement agreement with the respondent and agency or commence formal proceedings against the respondent.

(d) Representation by an attorney or other person.

- (1) If the respondent chooses to be represented by an attorney or any other person, the representative appearing for the respondent must submit a written and signed Notice of Appearance to the Board. The appearance of a member in good standing of the bar of a court of general jurisdiction of any state or territory of the United States will be indicated by the designation "Attorney for (person represented)." The appearance of

any other person will be indicated by the designation “Representative for (person represented).” The Board will not accept a response from or discuss the details of an enforcement action with any attorney or other person who has not submitted a Notice of Appearance.

- (2) To withdraw from representation, the representative must submit a written notice of withdrawal to the Board, signed by the respondent or otherwise explaining the reason for withdrawal. An attorney who has submitted a Notice of Appearance may withdraw from representation only with consent of the respondent or when other cause exists, as delineated in the applicable provisions of the New York Rules of Professional Conduct.
- (3) A Notice of Appearance, withdrawal or substitution may be submitted to the Board at any time prior to commencement of formal proceedings. After the service of the Notice of Petition and Petition pursuant to Board Rules § 2-03(b)(1), the OATH Rules govern the procedures for a Notice of Appearance, withdrawal or substitution.

(e) Stay of an enforcement action.

To obtain a stay of an enforcement action prior to commencement of formal proceedings, the respondent must submit a written request to the Board for its review and approval. After the service of the Notice of Petition and Petition pursuant to Board Rules § 2-03(b)(1), the OATH Rules govern the procedures for a stay.

(f) Settlement.

(1) At any time after the service of the Notice of Initial Determination of Probable Cause, an enforcement action may be resolved by settlement agreement in the form of a Public Disposition or Public Warning Letter.

(i) A Public Disposition must include an admission of the relevant facts; an acknowledgment that the admitted conduct violated a specific provision of the Conflicts of Interest Law, the Lobbyist Gift Law, the Affiliated Not-for-Profits Law, or the Legal Defense Trusts Law; and a penalty that addresses the admitted conduct.

(ii) A Public Warning Letter must include a statement of relevant facts, and a description of each violation of a specific provision of the Conflicts of Interest Law, the Lobbyist Gift Law, the Affiliated Not-for-Profits Law, or the Legal Defense Trusts Law.

(2) The language and penalty of the proposed settlement agreement will be negotiated between the enforcement attorney and the respondent or the respondent's representative, if applicable. If the respondent requests that the respondent's employing City agency be a party to the settlement, the respondent must submit a signed waiver of confidentiality to the Board to allow the enforcement attorney to discuss the proposed settlement agreement with such agency.

(3) If the enforcement attorney and the respondent reach a proposed settlement agreement, it will be reduced to writing and signed by the respondent, the respondent's representative, if applicable, and a representative of the respondent's employing City agency, if applicable. Any monetary penalty to be paid to the Board is due upon signing unless otherwise specified in the proposed settlement agreement. Monetary penalty

payments will be held by the Board in escrow until the proposed settlement agreement is fully executed by the Board.

(4) After receiving the full payment of any monetary penalty to be paid to the Board, the enforcement attorney will present the proposed settlement agreement to the Board for its review and approval.

(i) If the Board approves the proposed settlement agreement, the settlement agreement will be signed by the Board Chair. The fully-executed settlement agreement will be made public, but all underlying records, reports, memoranda, and files of the enforcement action will remain confidential in accordance with Charter § 2603(k).

(ii) If the Board does not approve the proposed settlement agreement, the Board may direct the enforcement attorney to seek modification of the penalty or the language in the settlement agreement. The modified proposed settlement agreement must be reviewed and approved by the Board.

§ 2-03 Formal Proceedings.

(a) Designation of OATH.

For the purposes of Charter § 2603(h)(2), and in accordance with Charter § 1048, the Board designates OATH to conduct hearings in accordance with the OATH Rules, except as otherwise provided by these rules.

(b) Commencement of formal proceedings.

- (1) The Board will commence formal proceedings at OATH by serving a Notice of Petition and Petition by certified mail, return receipt requested, and first class mail, to the respondent's last known residential address or actual place of business and to the respondent's representative, if applicable. After service, the enforcement attorney will file the Notice of Petition and Petition with OATH and will provide OATH with potential dates for a settlement conference and potential dates for a hearing.
- (2) After the conference and hearing dates have been scheduled at OATH, the enforcement attorney will serve a Notice of Hearing by certified mail, return receipt requested, and first class mail, to the respondent's last known residential address or actual place of business and to the respondent's representative, if applicable.

(c) Ex Parte communications with the Board.

- (1) After service of the Notice of Petition and Petition pursuant to Board Rules § 2-03(b)(1), any Board attorney involved in the prosecution of the enforcement action may not communicate *ex parte* with any member of the Board or any attorney serving as counsel to the Board concerning the merits of the enforcement action, except as provided in paragraph (2) of this subdivision.
- (2) An enforcement attorney may communicate *ex parte* with members of the Board or an attorney serving as counsel to the Board with respect to ministerial matters involving the enforcement action; on consent of the respondent or respondent's representative; or if deemed necessary by the Board or by an attorney serving as counsel to the Board.

(d) Answer.

The respondent may serve and file a written answer to the Petition in accordance with the OATH Rules. The answer may contain specific responses, by admission, denial, or otherwise, to each allegation of the Petition and assert all affirmative defenses, if any. The respondent may include in the answer matters in mitigation. The answer must contain the full name, address, telephone number, and email address of the respondent. If the respondent is represented, the representative's name, address, telephone number and email address must also appear on the answer. The answer must be signed by the respondent or respondent's representative.

(e) Settlement.

At the OATH settlement conference, an enforcement action may be resolved by settlement agreement pursuant to Board Rules § 2-02(f).

(f) Hearing.

- (1) The enforcement attorney will have the burden of proof by a preponderance of the evidence.
- (2) The enforcement attorney will make an opening statement first, after which the respondent may make an opening statement.
- (3) The enforcement attorney will initiate the presentation of evidence. After the enforcement attorney has completed the presentation of the Board's evidence, the respondent may present evidence. The enforcement attorney may present rebuttal evidence.
- (4) The enforcement attorney will make a closing statement first, after which the respondent may make a closing statement.

(g) OATH report.

After a hearing has been conducted, OATH will issue a confidential report of its recommended findings of fact and conclusions of law and its recommended disposition of the enforcement action. OATH will send the report, along with the original transcript of the hearing and all documents introduced into the record, to the Board for review. OATH will send a copy of the report to the enforcement attorney and the respondent or respondent's representative, if applicable.

(h) Comment on OATH report.

Within twenty (20) days from the date of the OATH report, each party may submit a comment to the Board to explain, rebut, or provide information concerning OATH's recommended findings of fact, conclusions of law, and disposition. If either party submits a comment, the opposing party may submit to the Board a response to such comment within thirty (30) days from the date of the OATH report. Copies of all such submissions must be shared with the opposing party. The Board will not consider new evidence submitted in a comment or in a response to a comment.

(i) Final review by the Board.

For the purposes of Charter § 2603(h)(3), the Board will review the OATH report, along with the original transcript of the hearing and all documents introduced into the record, and any comments and responses to comments submitted to the Board pursuant to Board Rules § 2-03(h), to determine whether it has been proven by a preponderance of the evidence that the respondent violated a provision of the Conflicts of Interest Law, the Lobbyist Gift Law, the Affiliated Not-for-Profits Law, or the Legal Defense Trusts Law. In accordance with Board Rules § 2-03(c), any Board

attorney involved in the prosecution of the enforcement action will not participate in the Board's final review.

(j) Board order finding a violation.

- (1) If the Board determines that it has been proven by a preponderance of the evidence that the respondent violated a provision of the Conflicts of Interest Law, the Lobbyist Gift Law, the Affiliated Not-for-Profits Law, or the Legal Defense Trusts Law, the Board will issue an order stating its final findings of fact and conclusions of law and imposing a penalty, except, if the respondent is a current Member or employee of the New York City Council, the Board will issue an order stating its final findings of fact and conclusions of law and recommending a penalty to the New York City Council. The order will include notice of the respondent's right to appeal to the New York State Supreme Court.
- (2) All orders of the Board will be made public. The Board may also make the OATH report public as part of its order, but all other underlying records, reports, memoranda, and files will remain confidential in accordance with Charter § 2603(k).
- (3) The order will be sent by first class mail to the respondent's last known residential address or actual place of business and to the respondent's representative, if applicable.
- (4) If the order imposes a monetary penalty, payment is due to the Board within thirty (30) days of the date of service. If the respondent does not pay the full monetary penalty amount, the Board will refer the matter to the New York City Law Department for collection.

(k) Board dismissal.

If the Board determines that it has not been proven by a preponderance of the evidence that the respondent violated any provision of the Conflicts of Interest Law, the Lobbyist Gift Law, the Affiliated Not-for-Profits Law, or the Legal Defense Trusts Law, the Board will issue a written decision that dismisses the enforcement action and states its final findings of fact and conclusions of law. The decision will be sent to the respondent and respondent's representative, if applicable, and will not be made public. All underlying records, reports, memoranda, and files will remain confidential in accordance with Charter § 2603(k).