

AGENCY RULES

CONFLICT OF INTEREST BOARD

FINAL RULES

The Conflicts of Interest Board adopted the following rule at its meeting on July 25, 1991.

Procedure for Hearings Conducted by the Conflicts of Interest Board

Statement of Basis and Purpose of Rule:

Pursuant to the authority vested in the Conflicts of Interest Board (the "Board") by Section 2603(h) of the New York City Charter, the Board is authorized to promulgate procedural rules for conducting adjudicatory hearings. Such hearings are to be held following the Board's determination that there is probable cause to believe that a public servant has violated a provision of the Conflicts of Interest Law (City Charter Chapter 68) or the financial disclosure law (Administrative Code Section 12-110). The rules proposed herein provide that the hearings shall be conducted by the Board or by the Office of Administrative Trials and Hearings, whenever designated by the Board.

Section. Procedural Rules for Hearings.

I. Initial Determination.

(a) **Notice.** If the Board makes an initial determination based on a complaint, investigation or other information available to the Board, that there is probable cause to believe that a public servant (which for purposes of Charter Section 2603(h) includes a former public servant) has violated a provision of Chapter 68 of the City Charter or Section 12-110 of the Administrative Code, the Board shall notify the public servant of its determination in writing. The notice shall contain a statement of the facts upon which the Board relied for its determination of probable cause and a statement of the provisions of law allegedly violated. The notice shall afford the public servant an opportunity, either orally or in writing, to respond to, explain, rebut, or provide information concerning the allegations in such notice within twenty days of receipt of the notice. The notice shall also inform the public servant of his right to be represented by counsel or any other person, and shall include a copy of the Board's procedural rules.

(b) **Request for a Stay.** In response to the Board's notice, the public servant may apply for a stay of the proceedings, for good cause shown. The Board may grant or deny such request in its sole discretion.

(c) **Admission of Facts.** If, in response to the Board's notice, the public servant admits to the facts contained therein or to a violation of the provisions of Chapter 68 of the City Charter or Section 12-110 of the Administrative Code and elects to forgo a hearing, the Board may, after consulting with the head of the agency served or formerly served by the public servant, or in the case of an agency head, after consulting with the Mayor, issue an order finding a violation and imposing the penalties it deems appropriate under Chapter 68 of the City Charter, provided, however, that pursuant to Charter Section 2603(h)(3), the Board shall not impose penalties against members of the City Council, or public servants employed by the City Council or by members of the City Council, but may recommend to the City Council such penalties as it deems appropriate. When a penalty is recommended, the City Council shall report to the Board what action was taken.

(d) **No Probable Cause Finding.** If, after receipt of the public servant's response, the Board determines that there is no probable cause to believe that a violation has occurred, the Board shall dismiss the matter and inform the public servant in writing of its decision.

(e) **Service by the Board.** Notices, petitions, orders and other documents originating with the Board shall be served on the public servant (i) personally or by certified mail, return receipt requested, or (ii) by telephonic (FAX) or similar transmission, and (iii) in either case also by first class mail to the public servant's last known address.

(f) **Computation of Time.** The computation of any time period referred to in these rules shall be calculated in calendar days, except that when the last day of the time period is a Saturday, Sunday or legal holiday, the period shall run until the end of the next following business day. Where these rules prescribe different time periods for taking an action depending upon whether service of papers is personal or by mail, service of papers by telephonic (FAX) or similar transmission shall be deemed to be personal service, solely for purposes of calculating the applicable period of time.

II. Commencement of Formal Proceedings and Pleadings.

(a) **Determination of Probable Cause.** If, after consideration of the public servant's response, the Board determines that there remains probable cause to believe that a violation of the provisions of Chapter 68 of the City Charter or Section 12-110 of the Administrative Code has occurred, and the public servant has not elected to forgo the hearing, the Board shall hold or direct a hearing to be held on the record to determine whether such violation has occurred. If the public servant is subject to the jurisdiction of a state law provision or collective bargaining agreement which provides for the conduct of a disciplinary hearing by another body, the Board shall refer the matter to the appropriate entity. The hearing shall be conducted in accordance with the rules of that entity.

The Board may also refer a matter to the public servant's agency if the Board deems the probable cause violation to be minor or if other disciplinary charges are pending there against the public servant.

(b) Petition.

(1) The Board shall institute formal proceedings by serving a petition on the public servant. The petition shall set forth the facts upon which the Board relied in making its determination that there is probable cause to believe that the public servant has violated Chapter 68 of the City Charter or Section 12-110 of the Administrative Code, as well as the applicable provisions thereof which are alleged to have been violated. The petition shall also advise the public servant of the public servant's rights to file an answer, to a hearing, to be represented at such hearing by counsel or any other person, and to cross-examine witnesses and present evidence.

(c) Answer.

(1) **General Rule.** The public servant shall answer the petition by serving an answer on the Board within eight days after service of the petition if service was personal, or within thirteen days after service of the petition if service was by mail, unless a different time is fixed by the Board. The public servant shall serve the answer personally or by certified or registered mail, return receipt requested.

(2) **Form and Contents of Answer.** The answer shall be in writing and shall contain specific responses, by admission, denial or otherwise, to each allegation of the petition and shall assert all affirmative defenses, if any. The public servant may include in the answer matters in mitigation. The answer shall be signed and shall contain the full name, address and telephone number of the public servant. If the public servant is represented, the representative's name, address and telephone number shall also appear on the answer, which shall be signed by either the public servant or by his or her representative.

(3) **Effect of Failure to Answer.** If the public servant fails to serve an answer, all allegations of the petition shall be deemed admitted and the Board shall proceed to hold a hearing in which prosecuting counsel shall submit for the record an offer of proof establishing the factual basis on which the Board may issue an order. If the public servant fails to respond specifically to any allegation or charges in the petition, such allegation or charges shall be deemed admitted.

(d) **Amendment of Pleadings.** Pleadings shall be amended as promptly as possible upon conditions just to all parties. If a pleading is to be amended less than twenty-five days before the commencement of the hearing, the amendment may be made only on consent of the parties or by leave of the Board.

III. Hearings.

(a) **Conduct of Hearing.** The Board shall conduct hearings or designate the Chief Administrative Law Judge of the Office of Administrative Trials and Hearings (OATH) or such administrative law judge (ALJ) as the Chief Administrative Law Judge shall assign, to conduct hearings. If the Board refers a hearing to OATH, a copy of the petition will also be sent to OATH at the time the public servant is served with the petition. OATH shall conduct the hearing in accordance with its rules except that:

(1) Pursuant to Charter Section 2603(h)(4), hearings shall not be open to the public unless requested by the public servant;

(2) Notwithstanding OATH's rule 2.4, an answer in response to a petition is mandatory, not optional;

(3) Notwithstanding OATH's rule 2.13(e), the public servant's failure to file an answer will not under any circumstances result in dismissal of the case;

(b) **Hearings of the Board.** The Board shall conduct its hearings, including such pre-hearing matters as conferences, discovery and motion practice, in conformance with the rules and procedures of OATH except for the following modifications:

(1) **Closure of Hearings.** Hearings of the Board shall not be public unless requested by the public servant;

(2) **Subpoenas.** Subpoenas requiring the attendance of a witness and subpoenas duces tecum requiring the production of books, papers, and other things may be issued only by the Board upon application of a party or upon the Board's own motion. In addition to or in lieu of these subpoenas, the Board may also issue an order directing the party or person under the control of a party to attend or produce;

(3) **Disposition by Agreement.** At any time after the commencement of formal proceedings, the public servant and the Board (or the member of the Board designated pursuant to Rule III, (c)(1) hereof to hear the case) may agree to dispose of the case. For this purpose, the Board or such member may conduct a conference. If terms of disposition are reached, they shall be reduced to writing and signed by the public servant or his or her representative and the Board or placed on the record. When a disposition is based on a determination by the Board that a public servant has violated a provision of Chapter 68 of the City Charter or Section 12-110 of the Administrative Code, that disposition shall be made public by the Board. Prior to the disposition of a case, the Board shall consult with the head of the agency involved, or in the case where the public servant is an agency head or former agency head, with the Mayor;

(4) **Order of Proceedings.** Prosecuting counsel shall have the burden of proof by the preponderance of the evidence, shall initiate the presentation of evidence, and may present rebuttal evidence. The public servant may introduce evidence after prosecuting counsel has completed his or her case. Opening statements, if any, shall be made first by prosecuting counsel. Closing statements, if any, shall be made first by the public servant. This order of proceedings may be modified at the discretion of the Board;

(5) **Ex Parte Communications.** In addition to the requirements of OATH rule 4.4, if staff counsel for the Board is to prosecute a case, the individual designated as staff counsel shall not communicate ex parte with the Board concerning the case once the Board has determined that there is probable cause to believe that a violation of the provisions of Chapter 68 has occurred.

(c) Assignment of Hearing, Quorum and Presiding Member.

(1) The Board may designate a member of the Board to hear a case, make findings of fact and conclusions of law, preside over pre-hearing matters and adjournments, and make recommendations to the full Board for the proposed disposition of the proceeding.

(2) Two members of the Board shall constitute a quorum for the purposes of issuing a final order or any other final determination.

(3) When a hearing is conducted by the full Board, the hearing shall be presided over by the Board's Chair or his or her designee.

IV. Concluding Procedures.

(a) Decisions and Orders.

(1) When a hearing has been conducted by either OATH or a member of the Board designated to hear the case, a report of recommended findings of fact and conclusions of law, and recommendations for the disposition of the proceeding shall be issued and forwarded, along with the original transcript of the proceeding and all documents introduced into the record to the Board for review and final action. The report shall not be made public. A copy of the report and recommendation shall be sent to all parties and their counsel or other representative in order to afford them the opportunity to comment before final action is taken by the Board. If prosecuting counsel or the public servant wishes to comment, he or she shall do so within ten days of receipt of the report and recommendation.

(2) If after the hearing and upon a consideration of all the evidence in the record of hearing, including comments, the Board finds that a public servant has engaged in conduct prohibited by Chapter 68 of the City Charter or Section 12-110 of the Administrative Code, the Board shall, in the case of a violation of Chapter 68, consult with the head of the agency served or formerly served by the public servant, or in the case of an agency head, consult with the Mayor. Whether it is a violation of Chapter 68 or Section 12-110, the Board should state its final findings of fact and conclusions of law and issue an order imposing any penalties it deems appropriate under either section. The order shall include notice of the public servant's right to appeal to the New York State Supreme Court. Alternatively, it may state its findings and conclusions and recommend a penalty, if any, to the head of the agency served by the public servant or former public servant or, in the case of an agency head or former agency head, to the Mayor. Pursuant to Charter Section 2604(h)(3), the Board shall not impose penalties against members of the City Council, or public servants employed by the City Council or by members of the City Council, but may state its findings and conclusions and recommend to the City Council such penalties as it deems appropriate. When a penalty is recommended, the head of the agency, Mayor or City Council shall report to the Board what action was taken.

(3) In instances where the Board does not hold a hearing and instead refers a matter to another agency, that agency shall consult with the Board prior to issuing its final decision.

(4) If, after the hearing and upon consideration of the record, the Board finds that a public servant has not engaged in acts prohibited by Chapter 68 of the City Charter or Section 12-110 of the Administrative Code, the Board shall state its findings of facts and conclusions of law and shall issue an order dismissing the petition. The order shall not be made public.

V. Confidentiality.

All matters relating to complaints submitted to or investigated by the Board, or any actions taken by the Board in connection therewith or hearings conducted by the Board or OATH, shall be kept confidential unless waived by the public servant who may request a public hearing. The foregoing shall not apply to the final findings, conclusions and order issued upon a violation of Chapter 68, which shall be made public.

CONFLICTS OF INTEREST BOARD

CITY OF NEW YORK CONFLICTS OF INTEREST BOARD

Notice of Adoption of Amendments to Procedural Rules for Hearings

NOTICE IS HEREBY GIVEN THAT, pursuant to the authority vested in the Conflicts of Interest Board by Section 2603(a) of the New York City Charter and in accordance with Section 1043 of the New York City Charter, the Conflicts of Interest Board has adopted amendments to its procedural rules for hearings, Sections 2-01 through 2-05 of Title 53 of the Rules of the City of New York. Pursuant to a notice published on November 9, 1995, in The City Record, a public hearing on the proposed amendments was held on December 20, 1995, at 2 Lafayette Street, New York, New York. The Board received comments only from the Office of Administrative Trials and Hearings and adopted the proposed amendments, with one change, as final. The text of the amendments is set out below. Additions to the current rules are underlined; deletions from the current rules are bracketed.

Dated: February 1, 1996

- § 2-01 Initial Determination.
- § 2-02 Commencement of Formal Proceedings and Pleadings.
- § 2-03 Hearing.
- § 2-04 [Concluding Procedures] Decisions and Orders.
- § 2-05 [Confidentiality] General Matters.

§ 2-01 Initial Determination.

(a) Notice. If the Board makes an initial determination, based on a complaint, investigation, or other information available to the Board, that there is probable cause to believe that a public servant (which for purposes of Charter § 2603(h) includes a former public servant) has violated a provision of Chapter 68 of the City Charter [or § 12-110 of the Administrative Code], the Board shall notify the public servant of its determination in writing. The notice shall contain a statement of the facts upon which the Board relied for its determination of probable cause and a statement of the provisions of law allegedly violated. The notice shall afford the public servant an opportunity, either orally or in writing, to respond to, explain, rebut, or provide information concerning the allegations in such notice within [twenty] fifteen days of [receipt] ~~EXPIRES~~ of the notice. The notice shall also inform the public servant of his or her right to be represented by counsel or any other person, and shall include a copy of the Board's procedural rules. A notice of initial determination shall not be required in a proceeding brought pursuant to Section 12-110 of the Administrative Code.

(b) Request for a Stay. In response to the Board's notice, the public servant may apply to the Board for a stay of the proceedings, for good cause shown. The Board may grant or deny such request in its sole discretion.

(c) Admission of Facts. If, in response to the Board's notice, the public servant admits to the facts contained therein or to a violation of the provisions of Chapter 68 of the City Charter [or § 12-110 of the Administrative Code] and elects to forgo a hearing, the Board may, after consulting with the head of the agency served or formerly served by the public servant, or, in the case of an agency head, after consulting with the Mayor, issue an order finding a violation and imposing the penalties it deems appropriate under Chapter 68 of the City Charter, provided, however, that pursuant to Charter § 2603(h)(3), the Board shall not impose penalties against members of the City Council, or public servants employed by the City Council or by members of the City Council, but may recommend to the City Council such penalties as [it] the Board deems appropriate. When a penalty is recommended, the City Council shall report to the Board what action was taken.

(d) No Probable Cause Finding. If, after receipt of the public servant's response, the Board determines that there is no probable cause to believe that a violation has occurred, the Board shall dismiss the matter and inform the public servant in writing of its decision.

(e) Service by the Board. Notices, petitions, orders and other documents originating with the Board shall be served on the public servant (i) personally or by certified mail, return receipt requested, or (ii) by telephonic (FAX) or similar transmission, and (iii) in either case also by first class mail to the public servant's last known address.

(f) Computation of Time. The computation of any time period referred to in these rules shall be calculated in calendar days, except that when the last day of the time period is a Saturday, Sunday or legal holiday, the period shall run until the end of the next following business day. Where these rules prescribe different time periods for taking an action depending upon whether service of papers is personal or by mail, service of papers by telephonic (FAX) or similar transmission shall be deemed to be personal service, solely for purposes of calculating the applicable period of time.)

§ 2-02 Commencement of Formal Proceedings and Pleadings.

(a) Determination of Probable Cause. If, after consideration of the public servant's response, the Board determines that there remains probable cause to believe that a violation of the provisions of Chapter 68 of the City Charter [or § 12-110 of the Administrative Code] has occurred, and the public servant has not elected to forgo the hearing, the Board shall hold or direct a

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hearing to be held on the record to determine whether such violation has occurred.

If the public servant is subject to the jurisdiction of a state law provision or collective bargaining agreement which provides for the conduct of a disciplinary hearing by another body, the Board shall refer the matter to the appropriate entity. The hearing shall be conducted in accordance with the rules of that entity.

The Board may also refer a matter to the public servant's agency if the Board deems the [probable cause] violation to be minor or if other disciplinary charges are pending there against the public servant.

(b) Petition. The Board shall institute formal proceedings by serving a petition on the public servant. The petition shall set forth the facts upon which the Board relied in making its determination that there is probable cause to believe that the public servant has violated which, if proved, would constitute a violation of Chapter 68 of the City Charter or § 12-110 of the Administrative Code, as well as the applicable provisions thereof which are alleged to have been violated. The petition shall also advise the public servant of the public servant's rights to file an answer, to a hearing, to be represented at such hearing by counsel or any other person, and to cross-examine witnesses and present evidence.

(c) Answer.

(1) General Rule. The public servant shall answer the petition by serving an answer on the Board within eight days after service of the petition (if service was personal, or within thirteen days after service of the petition if service was by mail), unless a different time is fixed by the Board. The public servant shall serve the answer personally or by certified or registered mail, return receipt requested.

(2) Form and Contents of Answer. The answer shall be in writing and shall contain specific responses, by admission, denial, or otherwise, to each allegation of the petition and shall assert all affirmative defenses, if any. The public servant may include in the answer matters in mitigation. The answer shall be signed and shall contain the full name, address, and telephone number of the public servant. If the public servant is represented, the representative's name, address, and telephone number shall also appear on the answer, which shall be signed by either the public servant or by his or her representative.

(3) Effect of Failure to Answer. If the public servant fails to serve an answer, all allegations of the petition shall be deemed admitted and the Board shall proceed to hold a hearing in which prosecuting counsel shall submit for the record an offer of proof establishing the factual basis on which the Board may issue an order. If the public servant fails to respond specifically to any allegation or charge in the petition, such allegation or charge shall be deemed admitted.

(d) Amendment of Pleadings. Pleadings shall be amended as promptly as possible upon conditions just to all parties. If a pleading is to be amended less than twenty-five days before the commencement of the hearing, the amendment may be made only on consent of the parties or by leave of the Board, if the Board is conducting the hearing, or by leave of a Board member or Administrative Law Judge, if the Board member or Administrative Law Judge is conducting the hearing.

§ 2-03 Hearing.

(a) Conduct of [Hearing] Hearings Generally. [The Board shall conduct hearings or designate] hearings shall be conducted by the Board or, upon designation by the Board, by a member of the Board or the Chief Administrative Law Judge of the Office of Administrative Trials and Hearings (OATH), or such administrative law judge (ALJ) as the Chief Administrative Law Judge shall assign, to conduct hearings].

[(1) Pursuant to Charter § 3603(h)(4), hearings shall not be open to the public unless requested by the public servant;

(2) Notwithstanding OATH rule § 1-07(d), an answer in response to a petition is mandatory, not optional;

(3) Notwithstanding OATH's rule § 1-07(a)(5), the public servant's failure to file an answer will not under any circumstances result in dismissal of the case;]

(b) Subpoenas. Subpoenas requiring the attendance of a witness and subpoenas duces tecum requiring the production of books, papers, and other things may be issued only by (i) the Administrative Law Judge, where the hearing has been referred to OATH, or (ii) a member of the Board, where the hearing is conducted by the Board or by a member of the Board, upon application of a party or upon the Administrative Law Judge's or the Board member's own motion. In addition to or in lieu of these subpoenas, the Administrative Law Judge or the Board member may also issue an order directing the party or person under the control of a party to attend or produce.

(c) Conduct of Hearings by OATH. If the Board refers a hearing to OATH, a copy of the petition [will] shall also be sent to OATH at the time the public servant is served with the petition. OATH shall conduct the hearing in accordance with its rules, as set forth in Title 48 of the Rules of the City of New York, except [that:] as otherwise provided by these rules.

[(1) Closure of Hearings. Hearings of the Board shall not be public unless requested by the public servant;

(2) Subpoenas. Subpoenas requiring the attendance of a witness and subpoenas duces tecum requiring the production of books, papers, and other things may be issued only by the Board upon application of a party or upon the Board's own motion. In addition to or in lieu of these subpoenas, the Board may also issue an order directing the party or person under the control of a party to attend or produce;

(3) Disposition by Agreement. At any time after the commencement of formal proceedings, the public servant and the Board (or the member of the Board designated pursuant to § 2-03(c)(1) hereof to hear the case) may agree to dispose of the case. For this purpose, the Board or such member may conduct a conference. If terms of disposition are reached, they shall be reduced to writing and signed by the public servant or his or her representative and the Board or placed on the record. When a disposition is based on a determination by the Board that a public servant has violated a provision of Chapter 68 of the City Charter or § 12-110 of the Administrative Code, that disposition shall be made public by the Board. Prior to the disposition of a case, the Board shall consult with the head of the agency involved, or in the case where the public servant is an agency head or former agency head, with the Mayor;]

(d) Conduct of Hearings [of] by the Board or by a Board Member.

[(1) Generally. The Board may hear a case or may designate a member of the Board to hear a case, make findings of fact and conclusions of law, preside over pre-hearing matters and adjournments, and make recommendations to the Board for the proposed disposition of the proceeding. When a hearing is conducted by the Board, the hearing shall be presided over by the Board's Chair or by his or her designee. The Board or Board member shall conduct the hearing, including such pre-hearing matters as conferences, discovery, and motion practice, in conformance with the rules and procedures of OATH, as set forth in Title 48 of the Rules of the City of New York, except as otherwise provided by these rules.

[(2) Disposition Conferences and Agreements. If disposition of the proceeding is to be discussed at a conference, the Board shall designate an individual other than a Board member participating in the hearing, to conduct the conference. During disposition discussions, upon notice to the parties, the person conducting the conference may confer with each party and/or representative separately. Board members shall not be called to testify in any proceeding concerning statements made at a disposition conference.

[(4)](1) Order of Proceedings. Prosecuting counsel shall have the burden of proof by the preponderance of the evidence, shall initiate the presentation of evidence, and may present rebuttal evidence. The public servant may introduce evidence after prosecuting counsel has completed his or her case. Opening statements, if any, shall be made first by prosecuting counsel. Closing statements, if any, shall be made first by the public servant. This order of proceedings may be modified at the discretion of the Board or Board member[;].

[(5) Ex Parte Communications. In addition to the requirements of OATH rule § 1-09(d), if staff counsel for the Board is to prosecute a case, the individual designated as staff counsel shall not communicate ex parte with the Board concerning the case once the Board has determined that there is probable cause to believe that a violation of the provisions of Chapter 68 has occurred.

(c) Assignment of Hearing, Quorum, and Presiding Member.

(1) The Board may designate a member of the Board to hear a case, make findings of fact and conclusions of law, preside over pre-hearing matters and adjournments, and make recommendations to the full Board for the proposed disposition of the proceeding.

(2) Two members of the Board shall constitute a quorum for the purposes of issuing a final order or any other final determination.

(3) When a hearing is conducted by the full Board, the hearing shall be presided over by the Board's Chair or his or her designee.]

5 2-04 [Concluding Procedures] Decisions and Orders

(a) [Decisions and Orders.

(1) Report to the Board. When a hearing has been conducted by either OATH or a member of the Board designated to hear the case, a report of recommended findings of fact and conclusions of law, and recommendations for the disposition of the proceeding shall be issued and forwarded, along with the original transcript of the proceeding and all documents introduced into the record, to the Board for review and final action. The report shall not be made public. A copy of the report and recommendation shall be sent to all parties and their counsel or other representative in order to afford them the opportunity to comment before final action is taken by the Board. If prosecuting counsel or the public servant wishes to comment, he or she shall do so within ten days of [receipt] service of the report and recommendation.

(2) (b) Finding of Violation. If after the hearing and upon a consideration of all the evidence in the record of hearing, including comments, the Board finds that a public servant has engaged in conduct prohibited by Chapter 68 of the City Charter (or § 12-110 of the Administrative Code), the Board shall, in the case of a violation of Chapter 68, consult with the head of the agency served or formerly served by the public servant, or in the case of an agency head, consult with the Mayor. [Whether it is] Where the Board finds a violation of Chapter 68 or § 12-110 of the Administrative Code, the Board (should) shall state its final findings of fact and conclusions of law and issue an order imposing any penalties it deems appropriate under either (section) statute. The order shall include notice of the public servant's right to appeal to the New York State Supreme Court. Alternatively, in the case of a violation of Chapter 68, (it) the Board may state its findings and conclusions and recommend a penalty, if any, to the head of the agency served by the public servant or former public servant or, in the case of an agency head or former agency head, to the Mayor. Pursuant to Charter § 2604(b)(3), the Board shall not impose penalties against members of the City Council, or public servants employed by the City Council or by members of the City Council, but may state its findings and conclusions and recommend to the City Council such penalties as (it) the Board deems appropriate. When a penalty is recommended, the head of the agency, Mayor, or City Council shall report to the Board what action was taken.

(3) (c) Consultation by Agency. In instances where the Board does not hold a hearing and instead refers a matter to [another] the public servant's agency, that agency shall consult with the Board prior to issuing its final decision.

(4) (d) Dismissals. If, after the hearing and upon consideration of the record, the Board finds that a public servant has not engaged in acts prohibited by Chapter 68 of the City Charter or § 12-110 of the Administrative Code, the Board shall state its findings of facts and conclusions of law and shall issue an order dismissing the petition. The order shall not be made public.

5 2-05 [Confidentiality] General Matters.

(a) Appearances before the Board.

(1) A party may appear before the Board in person, by an attorney, or by a duly authorized representative. The person appearing for the party shall file a notice of appearance with the Board. The filing of any papers by an attorney or other representative who has not previously appeared shall constitute the filing of a notice of appearance by that person and shall conform to the requirements of paragraphs (2) and (4) of this subdivision.

(2) 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 shall be indicated by the suffix "Esq." and the designation "Attorney for (person represented)." The appearance of any other person shall be indicated by the designation "Representative for (person represented)."

(3) Absent extraordinary circumstances, no application shall be made or argued by any attorney or other representative who has not filed a notice of appearance.

(4) A person may not file a notice of appearance on behalf of a party unless the person has been retained by that party to represent the party before the Board. Filing a notice of appearance constitutes a representation that the person appearing has been so retained.

(b) Withdrawal and Substitution of Counsel.

(1) An attorney who has filed a notice of appearance shall not withdraw from representation without the permission of the Board, upon application. Withdrawals shall not be granted unless upon consent of the client or when other cause exists, as delineated in the applicable provisions of the Code of Professional Responsibility.

(2) Notices of substitution of counsel served and filed more than twenty days prior to a hearing before the Board or before a member of the Board may be filed without leave of the Board or Board member. Notices of substitution of counsel served and filed less than twenty-one days prior to a hearing before the Board or before a member of the Board may be filed only with the permission of the Board or Board member, which permission shall be freely given, absent prejudice or substantial delay of the proceedings.

(c) Service of Petition by Board. A petition shall be served on the public servant (i) in the manner provided in Section 312-A, or subdivisions 1, 2, or 4 of Section 108, of the New York Civil Practice Law and Rules for service of a summons or (ii) by both certified mail, return receipt requested, and first class mail to the public servant's last known residence or actual place of business or (iii) in such manner as the Board directs, if service is impracticable under paragraphs (1) and (ii) of this subdivision, or (iv) in any manner agreed upon by counsel to the Board and the public servant or his or her representative.

(d) Service of Other Documents by Board. Notices, orders, and all other documents, except petitions and subpoenas, originating with the Board shall be served on the public servant (i) by personal delivery to the public servant or (ii) by first class mail to the public servant's last known residence or actual place of business or (iii) by overnight delivery service to the public servant's last known residence or actual place of business or (iv) by telephonic facsimile (FAX) or similar transmission or (v) by leaving the paper at the public servant's last known residence with a person of suitable age and discretion or (vi) in such manner as the Board directs, if service is impracticable under paragraphs (1), (ii), (iii), (iv), or (v) of this subdivision, or (vii) in any manner agreed upon by counsel to the Board and the public servant or his or her representative. Where the public servant has appeared by a representative, all papers served by the Board subsequent to that appearance shall be served upon the representative by one of the methods provided in paragraphs (i)-(vii) of this subdivision.

(e) Computation of Time. The computation of any time period referred to in these rules shall be calculated in calendar days, except that when the last day of the time period is a Saturday, Sunday, or public holiday, the period shall run until the end of the next following business day. Where a period of time prescribed by the rules set forth in this chapter is measured from the service of a paper and service of that paper is made in the manner provided by paragraph (d) of subdivision (a) or paragraph (d) of subdivision (b) of this section, five days shall be added to the prescribed period.

(f) Confidentiality. All matters relating to complaints submitted to or [investigated] inquired into by the Board, or any action taken by the Board in connection therewith or hearings conducted by the Board or OATH, shall be kept confidential unless [waived] by the public servant who may request a public hearing] the public servant waives confidentiality and the Board determines that confidentiality is not otherwise required. Hearings conducted by the Board or by OATH shall be public if requested by the public servant. [The foregoing shall not apply to the final] Final findings, conclusions, and [order] orders issued upon a violation of Chapter 68, which] shall be made public.

(g) Ex Parte Communications with Board.

(1) After service of the petition in a case, counsel conducting the prosecution of the case on behalf of the Board shall not communicate ex parte with any member of the Board concerning the merits of the case, except as provided in paragraph (2) of this subdivision.

(2) Counsel conducting the prosecution of a case on behalf of the Board may communicate ex parte with the Board, or any member thereof, with respect to ministerial matters involving the case or on consent of the respondent or respondent's counsel or in an emergency.

(h) Disposition by Agreement. At any time after the service of a notice of probable cause in a proceeding brought pursuant to Chapter 68 or at any time after service of a petition in a proceeding brought pursuant to Section 12-110 of the Administrative Code, the public servant and the Board may agree to dispose of the case by agreement. For this purpose, the Board or any Board member designated by the Board may conduct a disposition conference, provided that, when the Board or a member of the Board conducts or is to conduct the hearing, the Board shall comply with the requirements of section 2-01(d)(2). All offers of disposition, whether made at a conference, hearing, or otherwise, shall be confidential and shall be inadmissible at trial of any case. If a disposition by agreement is reached, it shall be reduced to writing and signed by the public servant or his or her representative and the Board or, in the discretion of the Board, placed on the record. When a disposition by agreement contains an acknowledgment that a public servant's conduct has violated a provision of Chapter 68 of

the City Charter or Section 12-118 of the Administrative Code, that disposition by agreement shall be made public by the Board.

(1) OATH Rules. In the event of any inconsistency between these rules and the rules of the Office of Administrative Trials and Hearings, these rules shall govern.

STATUTORY AUTHORITY: Section 2603(a) of the New York City Charter.

STATEMENT OF BASIS AND PURPOSE OF AMENDMENTS: Although the Conflicts of Interest Board's (the "Board's") procedural rules for hearings have worked well since their adoption in 1991, several problems have arisen with respect to those rules that need to be addressed, particularly in view of the Board's substantially increased enforcement efforts. The amendments address those problems.

The hearing process may be divided into four stages:

- (1) The Board's initial determination of probable cause to believe that the respondent has violated the conflicts of interest law (Chapter 68 of the New York City Charter) or the financial disclosure law (Section 12-118 of the Administrative Code) and the respondent's response;
- (2) Service of a petition, which commences the formal proceedings, and the respondent's answer;
- (3) The hearing; and
- (4) The decision and order of the Board.

The first four sections of the Board's hearing rules address each of these stages. The fifth section of the Board's hearing rules currently addresses only confidentiality but is amended to regulate miscellaneous matters that are relevant throughout the hearing process, such as service of papers.

The amendments effect eight primary changes in the Board's hearing rules:

- (1) Elimination of probable cause notices in financial disclosure litigation;
- (2) Elimination of the requirement for certified mail service, except for petitions (the jurisdiction-obtaining document that commences an enforcement proceeding) when they are served by first class mail, and expansion of the methods for serving Board documents to allow all methods of service permitted by the CPLR;
- (3) Clarification of which rules apply to hearings before OATH and which apply to hearings before the Board or before a Board member;
- (4) Clarification of the requirement that only the hearing officer may issue subpoenas in Chapter 68 or Section 12-110 hearings;
- (5) Clarification of the procedures for disposing of a case by agreement;
- (6) Authorization of ex parte communications between the enforcement attorney and the Board in certain circumstances;
- (7) Reorganization of the rules; and
- (8) Certain technical amendments, such as measuring deadlines from time of service instead of from time of receipt.

Each of these changes is discussed below.

Probable cause notices. Through complaints, through referrals from the Department of Investigation and other City agencies, and through the Board's own initiatives, the Board becomes aware of conduct that might violate Chapter 68. If upon examining that conduct the Board makes an initial determination that there is probable cause to believe that the public servant has violated a provision of Chapter 68, the Board must notify the public servant of that determination in writing. The notice must contain a statement of the facts upon which the Board relied for its determination and a statement of the provisions of law allegedly violated. Charter § 2603(h)(1); current Board rules § 2-01(a).

The financial disclosure law contains no such requirement for probable cause notices in financial disclosure litigation. Indeed, such notices have little use in such litigation, where the sole issue is whether the official filed his or her financial disclosure report (or paid his or her late fine). In addition, as a result of the large number of financial disclosure cases, the requirement of a probable cause notice imposes a substantial and unnecessary burden upon the Board's staff. For these reasons, the amendments eliminate the requirement of probable cause notices in cases arising under the financial disclosure law. See amended Board rule § 2-01.

Certified mail. The current Board rules require that the Board serve notices, petitions, orders, and other documents both by first class mail and either by personal service or by certified mail, return receipt requested, or by fax. Current Board rules § 2-01(e). Except for petitions, which formally commence the enforcement proceeding, no reason exists for requiring that every Board document be served twice. Such a requirement is wasteful and, particularly in financial disclosure litigation, imposes a significant burden upon the Board's staff, which currently spends substantial time simply filling out forms for certified mail. Furthermore, any method of service permissible under the Civil Practice Law and Rules ("CPLR") in civil litigation should also be permissible in Board proceedings. Accordingly, the amended rule eliminates the dual service requirement, except for petitions served by mail rather than by other methods of service, and expands the methods of service to include those permitted by the CPLR. For these purposes, the amended rule treats petitions like summonses and other Board documents like interlocutory papers. Amended Board rule § 2-05(c), (d).

Applicable rules in hearings. The current Board rules are vague as to which rules apply to hearings conducted by the Board or a Board member and which apply to hearings conducted by the Office of Administrative Trials and Hearings ("OATH") at the Board's request. For example, the current provisions regulating dispositions by agreement, although set forth in the subdivision dealing with Board hearings, would appear also to apply to hearings held before OATH. See current Board rules § 2-03(b)(3). The amendments clarify these matters and also clarify that hearings may be conducted by an individual Board member designated by the Board. See amended Board rule § 2-03.

Subpoenas. The current Board rules provide that, where the Board hears the case, only the Board may issue a subpoena. The amended rules require that subpoenas be issued by a member of the Board, where the Board or a Board member is hearing the case, or by an administrative law judge, where OATH is hearing the case. See amended Board rule § 2-03(b).

Dispositions by agreement. The amended rule clarifies a number of matters relating to the disposition of a proceeding by agreement between the respondent and the Board. See amended Board rule § 2-05(h). For example, the current rule suggests that a disposition by agreement must await service of a petition (which formally commences the proceeding), even in a Chapter 68 case, although in many instances the Board may be able favorably to dispose of a case by agreement after service of the probable cause notice. The current rule also suggests that an individual Board member may dispose of a case by agreement with the respondent, when in fact only the Board itself may dispose of a case.

The amended rule also introduces certain safeguards, based on OATH's rules, to prevent the appearance of bias as a result of settlement conferences, where the Board or a Board member is hearing the case. See amended Board rule §§ 2-03(d)(2), 2-05(h). The amended rule adopts the requirements of the OATH rules that offers of disposition are confidential and inadmissible at trial. Finally, the current rule appears to confuse a disposition by agreement and a determination by the Board that a violation of law has occurred. The Board may make such a determination of violation only after a hearing or respondent's default on a hearing or respondent's admission in response to the Board's notice of probable cause. See Charter § 2603(h)(3). After consultation with the respondent's agency head, the Board then issues an order of violation imposing or recommending penalties. A disposition by agreement, on the other hand, is an agreement between the Board and the respondent and does not involve any hearing or any determination by the Board that a violation of law has occurred. These matters have been clarified in the amended rule.

Ex parte communications. Current Board rule § 2-03(b)(5) prohibits ex parte communications between the prosecuting attorney and the Board once the Board "has determined that there is probable cause to believe that a violation of the provisions of Chapter 68 has occurred." That rule contains at least two defects. First, it is unclear whether "determined" refers to the initial determination of probable cause or the sustaining of probable cause. Second, the rule has proven unnecessarily cumbersome and an impediment to disposition of cases by agreement. The amended rule clarifies that the prohibition against ex parte communications comes into play once the petition is served, that the prohibition only applies to communications concerning the merits of the case, and that ex parte communications are permitted on ministerial matters, in an emergency, or with the consent of the respondent. Amended Board rule § 2-05(g).

Reorganization of rules. The current Board hearing rules contain provisions of general application within rules governing specific matters. For example, the provisions on service of documents and computation of time are contained in the rule on the initial determination of probable cause. Current Board rule § 2-01(e).

(f). The provisions on disposition by agreement and ex parte communications are set out in the rule on hearings. Current Board rule § 2-03(b)(3), (b)(5). The amended rule collects these provisions that address matters dealing with Board proceedings generally into Board rule § 2-05, which currently addresses only confidentiality. The rule on hearings is also reorganized. See amended rule § 2-03. Specifically, that amended rule is divided into four subdivisions: conduct of hearings generally, subpoenas, conduct of hearings by OATH, and conduct of hearings by the Board or a Board member. The provisions of the current rule § 2-03 are incorporated into the appropriate subdivision in the amended rule.

Technical amendments. The Board's rules are clarified by a number of technical amendments, including:

- Measuring time periods in all cases from the service of a document (amended rule §§ 2-01(a), 2-02(c)(1), 2-04(a));
- Setting out a provision, modelled on CPLR 2103(b)(2), for uniform extensions of time to serve documents in response to documents served by mail (amended Board rule § 2-05(e));
- Clarifying that leave for permission to amend a pleading may be granted by the person or entity conducting the hearing (amended Board rule § 2-02(d)) (this change was proposed by the Board during the commenting period);
- Deleting unnecessary cross-references to the OATH rules (current Board rule §§ 2-03(a)(1)-(3), (b)(1), (5));
- Clarifying that Board consultation with an agency head is not required in financial disclosure cases, only in Chapter 68 cases (amended Board rule § 2-04(b));
- Establishing procedures, based on OATH's rules, for appearances and substitution of counsel (amended Board rule § 2-05(a), (b));
- Changing "legal holiday" to "public holiday" to conform to General Construction Law § 24 and changing the provision on extensions of time where a deadline falls on a non-business day to conform to General Construction Law § 25-a (amended Board rule § 2-05(e)); and
- Specifying that OATH's rules yield to a contrary Board rule (amended Board rule § 2-05(i)).

The foregoing amendments to the Board hearing rules should streamline and substantially aid the Board in its enforcement efforts.

CITY OF NEW YORK CONFLICTS OF INTEREST BOARD

Notice of Adoption of Amendments to Procedural Rules for Hearings

NOTICE IS HEREBY GIVEN THAT, pursuant to the authority vested in the Conflicts of Interest Board by Section 2603(a) of the New York City Charter and in accordance with Section 1043 of the New York City Charter, the Conflicts of Interest Board has adopted amendments to its procedural rules for hearings, Sections 2-01 through 2-05 of Title 53 of the Rules of the City of New York. Pursuant to a notice published on November 9, 1995, in The City Record, a public hearing on the proposed amendments was held on December 20, 1995, at 2 Lafayette Street, New York, New York. The Board received comments only from the Office of Administrative Trials and Hearings and adopted the proposed amendments, with one change, as final. The text of the amendments is set out below. Additions to the current rules are underlined; deletions from the current rules are bracketed.

Dated: February 1, 1996

- § 2-01 *Initial Determination.*
- § 2-02 *Commencement of Formal Proceedings and Pleadings.*
- § 2-03 *Hearing.*
- § 2-04 *[Concluding Procedures] Decisions and Orders.*
- § 2-05 *[Confidentiality] General Matters.*

§ 2-01 *Initial Determination.*

(a) *Notice.* If the Board makes an initial determination, based on a complaint, investigation, or other information available to the Board, that there is probable cause to believe that a public servant (which for purposes of Charter § 2603(h) includes a former public servant) has violated a provision of Chapter 68 of the City Charter [or § 12-110 of the Administrative Code], the Board shall notify the public servant of its determination in writing. The notice shall contain a statement of the facts upon which the Board relied for its determination of probable cause and a statement of the provisions of law allegedly violated. The notice shall afford the public servant an opportunity, either orally or in writing, to respond to, explain, rebut, or provide information concerning the allegations in such notice within [twenty] fifteen days of [receipt] service of the notice. The notice shall also inform the public servant of his or her right to be represented by counsel or any other person, and shall include a copy of the Board's procedural rules. A notice of initial determination shall not be required in a proceeding brought pursuant to Section 12-110 of the Administrative Code.

(b) *Request for a Stay.* In response to the Board's notice, the

public servant may apply to the Board for a stay of the proceedings, for good cause shown. The Board may grant or deny such request in its sole discretion.

(c) *Admission of Facts.* If, in response to the Board's notice, the public servant admits to the facts contained therein or to a violation of the provisions of Chapter 68 of the City Charter [or § 12-110 of the Administrative Code] and elects to forgo a hearing, the Board may, after consulting with the head of the agency served or formerly served by the public servant, or, in the case of an agency head, after consulting with the Mayor, issue an order finding a violation and imposing the penalties it deems appropriate under Chapter 68 of the City Charter, provided, however, that pursuant to Charter § 2603(h)(3), the Board shall not impose penalties against members of the City Council, or public servants employed by the City Council or by members of the City Council, but may recommend to the City Council such penalties as [it] the Board deems appropriate. When a penalty is recommended, the City Council shall report to the Board what action was taken.

(d) *No Probable Cause Finding.* If, after receipt of the public servant's response, the Board determines that there is no probable cause to believe that a violation has occurred, the Board shall dismiss the matter and inform the public servant in writing of its decision.

[(e) *Service by the Board.* Notices, petitions, orders and other documents originating with the Board shall be served on the public servant (i) personally or by certified mail, return receipt requested, or (ii) by telephonic (FAX) or similar transmission, and (iii) in either case also by first class mail to the public servant's last known address.

(f) *Computation of Time.* The computation of any time period referred to in these rules shall be calculated in calendar days, except that when the last day of the time period is a Saturday, Sunday or legal holiday, the period shall run until the end of the next following business day. Where these rules prescribe different time periods for taking an action depending upon whether service of papers is personal or by mail, service of papers by telephonic (FAX) or similar transmission shall be deemed to be personal service, solely for purposes of calculating the applicable period of time.]

§ 2-02 *Commencement of Formal Proceedings and Pleadings.*

(a) *Determination of Probable Cause.* If, after consideration of the public servant's response, the Board determines that there remains probable cause to believe that a violation of the provisions of Chapter 68 of the City Charter [or § 12-110 of the Administrative Code] has occurred, and the public servant has not elected to forgo the hearing, the Board shall hold or direct a

hearing to be held on the record to determine whether such violation has occurred.

If the public servant is subject to the jurisdiction of a state law provision or collective bargaining agreement which provides for the conduct of a disciplinary hearing by another body, the Board shall refer the matter to the appropriate entity. The hearing shall be conducted in accordance with the rules of that entity.

The Board may also refer a matter to the public servant's agency if the Board deems the [probable cause] violation to be minor or if other disciplinary charges are pending there against the public servant.

(b) *Petition.* The Board shall institute formal proceedings by serving a petition on the public servant. The petition shall set forth the facts [upon which the Board relied in making its determination that there is probable cause to believe that the public servant has violated] which, if proved, would constitute a violation of Chapter 68 of the City Charter or [§] Section 12-110 of the Administrative Code, as well as the applicable provisions thereof which are alleged to have been violated. The petition shall also advise the public servant of the public servant's rights to file an answer, to a hearing, to be represented at such hearing by counsel or any other person, and to cross-examine witnesses and present evidence.

(c) *Answer.*

(1) *General Rule.* The public servant shall answer the petition by serving an answer on the Board within eight days after service of the petition [if service was personal, or within thirteen days after service of the petition if service was by mail], unless a different time is fixed by the Board. The public servant shall serve the answer personally or by certified or registered mail, return receipt requested.

(2) *Form and Contents of Answer.* The answer shall be in writing and shall contain specific responses, by admission, denial, or otherwise, to each allegation of the petition and shall assert all affirmative defenses, if any. The public servant may include in the answer matters in mitigation. The answer shall be signed and shall contain the full name, address, and telephone number of the public servant. If the public servant is represented, the representative's name, address, and telephone number shall also appear on the answer, which shall be signed by either the public servant or by his or her representative.

(3) *Effect of Failure to Answer.* If the public servant fails to serve an answer, all allegations of the petition shall be deemed admitted and the Board shall proceed to hold a hearing in which

prosecuting counsel shall submit for the record an offer of proof establishing the factual basis on which the Board may issue an order. If the public servant fails to respond specifically to any allegation or charge in the petition, such allegation or charge shall be deemed admitted.

(d) *Amendment of Pleadings.* Pleadings shall be amended as promptly as possible upon conditions just to all parties. If a pleading is to be amended less than twenty-five days before the commencement of the hearing, the amendment may be made only on consent of the parties or by leave of the Board, if the Board is conducting the hearing, or by leave of a Board member or Administrative Law Judge, if the Board member or Administrative Law Judge is conducting the hearing.

§ 2-03 *Hearing.*

(a) *Conduct of [Hearing] Hearings Generally.* [The Board shall conduct hearings or designate] Hearings shall be conducted by the Board or, upon designation by the Board, by a member of the Board or the Chief Administrative Law Judge of the Office of Administrative Trials and Hearings (OATH), or such administrative law judge (ALJ) as the Chief Administrative Law Judge shall assign[, to conduct hearings].

[(1) Pursuant to Charter § 2603(h)(4), hearings shall not be open to the public unless requested by the public servant;

(2) Notwithstanding OATH rule § 1-07(d), an answer in response to a petition is mandatory, not optional;

(3) Notwithstanding OATH's rule § 1-07(m)(5), the public servant's failure to file an answer will not under any circumstances result in dismissal of the case;]

(b) *Subpoenas.* Subpoenas requiring the attendance of a witness and subpoenas duces tecum requiring the production of books, papers, and other things may be issued only by (i) the Administrative Law Judge, where the hearing has been referred to OATH, or (ii) a member of the Board, where the hearing is conducted by the Board or by a member of the Board, upon application of a party or upon the Administrative Law Judge's or the Board member's own motion. In addition to or in lieu of these subpoenas, the Administrative Law Judge or the Board member may also issue an order directing the party or person under the control of a party to attend or produce.

(c) *Conduct of Hearings by OATH.* If the Board refers a hearing to OATH, a copy of the petition [will] shall also be sent to OATH at the time the public servant is served with the petition. OATH shall conduct the hearing in accordance with its rules, as set forth in Title 48 of the Rules of the City of New York, except

[that:] as otherwise provided by these rules.

[(1) *Closure of Hearings.* Hearings of the Board shall not be public unless requested by the public servant;

(2) *Subpoenas.* Subpoenas requiring the attendance of a witness and subpoenas duces tecum requiring the production of books, papers, and other things may be issued only by the Board upon application of a party or upon the Board's own motion. In addition to or in lieu of these subpoenas, the Board may also issue an order directing the party or person under the control of a party to attend or produce;

(3) *Disposition by Agreement.* At any time after the commencement of formal proceedings, the public servant and the Board (or the member of the Board designated pursuant to § 2-03(c)(1) hereof to hear the case) may agree to dispose of the case. For this purpose, the Board or such member may conduct a conference. If terms of disposition are reached, they shall be reduced to writing and signed by the public servant or his or her representative and the Board or placed on the record. When a disposition is based on a determination by the Board that a public servant has violated a provision of Chapter 68 of the City Charter or § 12-110 of the Administrative Code, that disposition shall be made public by the Board. Prior to the disposition of a case, the Board shall consult with the head of the agency involved, or in the case where the public servant is an agency head or former agency head, with the Mayor;]

(d) Conduct of Hearings [of] by the Board or by a Board Member.

(1) Generally. The Board may hear a case or may designate a member of the Board to hear a case, make findings of fact and conclusions of law, preside over pre-hearing matters and adjournments, and make recommendations to the Board for the proposed disposition of the proceeding. When a hearing is conducted by the Board, the hearing shall be presided over by the Board's Chair or by his or her designee. The Board or Board member shall conduct the hearing, including such pre-hearing matters as conferences, discovery, and motion practice, in conformance with the rules and procedures of OATH, as set forth in Title 48 of the Rules of the City of New York, except as otherwise provided by these rules.

(2) Disposition Conferences and Agreements. If disposition of the proceeding is to be discussed at a conference, the Board shall designate an individual, other than a Board member participating in the hearing, to conduct the conference. During disposition discussions, upon notice to the parties, the person conducting the conference may confer with each party and/or representative separately. Board members shall not be called to testify in any proceeding concerning statements made at a

disposition conference.

[(4)](3) *Order of Proceedings.* Prosecuting counsel shall have the burden of proof by the preponderance of the evidence, shall initiate the presentation of evidence, and may present rebuttal evidence. The public servant may introduce evidence after prosecuting counsel has completed his or her case. Opening statements, if any, shall be made first by prosecuting counsel. Closing statements, if any, shall be made first by the public servant. This order of proceedings may be modified at the discretion of the Board or Board member[;].

[(5) *Ex Parte Communications.* In addition to the requirements of OATH rule § 1-09(d), if staff counsel for the Board is to prosecute a case, the individual designated as staff counsel shall not communicate ex parte with the Board concerning the case once the Board has determined that there is probable cause to believe that a violation of the provisions of Chapter 68 has occurred.

(c) *Assignment of Hearing, Quorum, and Presiding Member.*

(1) The Board may designate a member of the Board to hear a case, make findings of fact and conclusions of law, preside over pre-hearing matters and adjournments, and make recommendations to the full Board for the proposed disposition of the proceeding.

(2) Two members of the Board shall constitute a quorum for the purposes of issuing a final order or any other final determination.

(3) When a hearing is conducted by the full Board, the hearing shall be presided over by the Board's Chair or his or her designee.]

§ 2-04 [Concluding Procedures] Decisions and Orders

(a) [Decisions and Orders.

(1)] Report to the Board. When a hearing has been conducted by either OATH or a member of the Board designated to hear the case, a report of recommended findings of fact and conclusions of law[,] and recommendations for the disposition of the proceeding shall be issued and forwarded, along with the original transcript of the proceeding and all documents introduced into the record, to the Board for review and final action. The report shall not be made public. A copy of the report and recommendation shall be sent to all parties and their counsel or other representative in order to afford them the opportunity to comment before final action is taken by the Board. If prosecuting counsel or the public servant wishes to comment, he or she shall do so within ten days of [receipt] service of the report and recommendation.

[(2)](b) Finding of Violation. If after the hearing and upon a consideration of all the evidence in the record of hearing, including comments, the Board finds that a public servant has engaged in conduct prohibited by Chapter 68 of the City Charter [or § 12-110 of the Administrative Code], the Board shall[, in the case of a violation of Chapter 68,] consult with the head of the agency served or formerly served by the public servant, or in the case of an agency head, consult with the Mayor. [Whether it is] Where the Board finds a violation of Chapter 68 or [§] Section 12-110 of the Administrative Code, the Board [should] shall state its final findings of fact and conclusions of law and issue an order imposing any penalties it deems appropriate under either [section] statute. The order shall include notice of the public servant's right to appeal to the New York State Supreme Court. Alternatively, in the case of a violation of Chapter 68, [it] the Board may state its findings and conclusions and recommend a penalty, if any, to the head of the agency served by the public servant or former public servant or, in the case of an agency head or former agency head, to the Mayor. Pursuant to Charter § 2604(h)(3), the Board shall not impose penalties against members of the City Council, or public servants employed by the City Council or by members of the City Council, but may state its findings and conclusions and recommend to the City Council such penalties as [it] the Board deems appropriate. When a penalty is recommended, the head of the agency, Mayor, or City Council shall report to the Board what action was taken.

[(3)](c) Consultation by Agency. In instances where the Board does not hold a hearing and instead refers a matter to [another] the public servant's agency, that agency shall consult with the Board prior to issuing its final decision.

[(4)](d) Dismissals. If, after the hearing and upon consideration of the record, the Board finds that a public servant has not engaged in acts prohibited by Chapter 68 of the City Charter or [§] Section 12-110 of the Administrative Code, the Board shall state its findings of facts and conclusions of law and shall issue an order dismissing the petition. The order shall not be made public.

§ 2-05 [Confidentiality] General Matters.

(a) Appearances before the Board.

(1) A party may appear before the Board in person, by an attorney, or by a duly authorized representative. The person appearing for the party shall file a notice of appearance with the Board. The filing of any papers by an attorney or other representative who has not previously appeared shall constitute the filing of a notice of appearance by that person and shall conform to the requirements of paragraphs (2) and (4) of this subdivision.

(2) 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 shall be indicated by the suffix "Esq." and the designation "Attorney for (person represented)." The appearance of any other person shall be indicated by the designation "Representative for (person represented)."

(3) Absent extraordinary circumstances, no application shall be made or argued by any attorney or other representative who has not filed a notice of appearance.

(4) A person may not file a notice of appearance on behalf of a party unless the person has been retained by that party to represent the party before the Board. Filing a notice of appearance constitutes a representation that the person appearing has been so retained.

(b) *Withdrawal and Substitution of Counsel.*

(1) An attorney who has filed a notice of appearance shall not withdraw from representation without the permission of the Board, upon application. Withdrawals shall not be granted unless upon consent of the client or when other cause exists, as delineated in the applicable provisions of the Code of Professional Responsibility.

(2) Notices of substitution of counsel served and filed more than twenty days prior to a hearing before the Board or before a member of the Board may be filed without leave of the Board or Board member. Notices of substitution of counsel served and filed less than twenty-one days prior to a hearing before the Board or before a member of the Board may be filed only with the permission of the Board or Board member, which permission shall be freely given, absent prejudice or substantial delay of the proceedings.

(c) *Service of Petition by Board.* A petition shall be served on the public servant (i) in the manner provided in Section 312-a, or subdivisions 1, 2, or 4 of Section 308, of the New York Civil Practice Law and Rules for service of a summons or (ii) by both certified mail, return receipt requested, and first class mail to the public servant's last known residence or actual place of business or (iii) in such manner as the Board directs, if service is impracticable under paragraphs (i) and (ii) of this subdivision, or (iv) in any manner agreed upon by counsel to the Board and the public servant or his or her representative.

(d) *Service of Other Documents by Board.* Notices, orders, and all other documents, except petitions and subpoenas, originating with the Board shall be served on the public servant (i) by personal delivery to the public servant or (ii) by first class mail to the public servant's last known residence or actual place of business or (iii) by overnight delivery service to the public servant's last known residence or actual place of business or (iv) by telephonic

facsimile (FAX) or similar transmission or (v) by leaving the paper at the public servant's last known residence with a person of suitable age and discretion or (vi) in such manner as the Board directs, if service is impracticable under paragraphs (i), (ii), (iii), (iv), or (v) of this subdivision, or (vii) in any manner agreed upon by counsel to the Board and the public servant or his or her representative. Where the public servant has appeared by a representative, all papers served by the Board subsequent to that appearance shall be served upon the representative by one of the methods provided in paragraphs (i)-(vii) of this subdivision.

(e) Computation of Time. The computation of any time period referred to in these rules shall be calculated in calendar days, except that when the last day of the time period is a Saturday, Sunday, or public holiday, the period shall run until the end of the next following business day. Where a period of time prescribed by the rules set forth in this chapter is measured from the service of a paper and service of that paper is made in the manner provided by paragraph (ii) of subdivision (a) or paragraph (ii) of subdivision (b) of this section, five days shall be added to the prescribed period.

(f) Confidentiality. All matters relating to complaints submitted to or [investigated] inquired into by the Board, or any action taken by the Board in connection therewith or hearings conducted by the Board or OATH, shall be kept confidential unless [waived by the public servant who may request a public hearing] the public servant waives confidentiality and the Board determines that confidentiality is not otherwise required. Hearings conducted by the Board or by OATH shall be public if requested by the public servant. [The foregoing shall not apply to the final] Final findings, conclusions, and [order] orders issued upon a violation of Chapter 68[, which] shall be made public.

(g) Ex Parte Communications with Board.

(1) After service of the petition in a case, counsel conducting the prosecution of the case on behalf of the Board shall not communicate ex parte with any member of the Board concerning the merits of the case, except as provided in paragraph (2) of this subdivision.

(2) Counsel conducting the prosecution of a case on behalf of the Board may communicate ex parte with the Board, or any member thereof, with respect to ministerial matters involving the case or on consent of the respondent or respondent's counsel or in an emergency.

(h) Disposition by Agreement. At any time after the service of a notice of probable cause in a proceeding brought pursuant to Chapter 68 or at any time after service of a petition in a proceeding brought pursuant to Section 12-110 of the Administrative

Code, the public servant and the Board may agree to dispose of the case by agreement. For this purpose, the Board or any Board member designated by the Board may conduct a disposition conference, provided that, when the Board or a member of the Board conducts or is to conduct the hearing, the Board shall comply with the requirements of section 2-03(d)(2). All offers of disposition, whether made at a conference, hearing, or otherwise, shall be confidential and shall be inadmissible at trial of any case. If a disposition by agreement is reached, it shall be reduced to writing and signed by the public servant or his or her representative and the Board or, in the discretion of the Board, placed on the record. When a disposition by agreement contains an acknowledgment that a public servant's conduct has violated a provision of Chapter 68 of the City Charter or Section 12-110 of the Administrative Code, that disposition by agreement shall be made public by the Board.

(i) OATH Rules. In the event of any inconsistency between these rules and the rules of the Office of Administrative Trials and Hearings, these rules shall govern.

STATUTORY AUTHORITY: Section 2603(a) of the New York City Charter.

STATEMENT OF BASIS AND PURPOSE OF AMENDMENTS: Although the Conflicts of Interest Board's (the "Board's") procedural rules for hearings have worked well since their adoption in 1991, several problems have arisen with respect to those rules that need to be addressed, particularly in view of the Board's substantially increased enforcement efforts. The amendments address those problems.

The hearing process may be divided into four stages:

(1) The Board's initial determination of probable cause to believe that the respondent has violated the conflicts of interest law (Chapter 68 of the New York City Charter) or the financial disclosure law (Section 12-110 of the Administrative Code) and the respondent's response;

(2) Service of a petition, which commences the formal proceedings, and the respondent's answer;

(3) The hearing; and

(4) The decision and order of the Board.

The first four sections of the Board's hearing rules address each of these stages. The fifth section of the Board's hearing rules currently addresses only confidentiality but is amended to regulate miscellaneous matters that are relevant throughout the hearing process, such as service of papers.

The amendments effect eight primary changes in the Board's

hearing rules:

(1) Elimination of probable cause notices in financial disclosure litigation;

(2) Elimination of the requirement for certified mail service, except for petitions (the jurisdiction-obtaining document that commences an enforcement proceeding) when they are served by first class mail, and expansion of the methods for serving Board documents to allow all methods of service permitted by the CPLR;

(3) Clarification of which rules apply to hearings before OATH and which apply to hearings before the Board or before a Board member;

(4) Clarification of the requirement that only the hearing officer may issue subpoenas in Chapter 68 or Section 12-110 hearings;

(5) Clarification of the procedures for disposing of a case by agreement;

(6) Authorization of ex parte communications between the enforcement attorney and the Board in certain circumstances;

(7) Reorganization of the rules; and

(8) Certain technical amendments, such as measuring deadlines from time of service instead of from time of receipt.

Each of these changes is discussed below.

Probable cause notices. Through complaints, through referrals from the Department of Investigation and other City agencies, and through the Board's own initiatives, the Board becomes aware of conduct that might violate Chapter 68. If upon examining that conduct the Board makes an initial determination that there is probable cause to believe that the public servant has violated a provision of Chapter 68, the Board must notify the public servant of that determination in writing. The notice must contain a statement of the facts upon which the Board relied for its determination and a statement of the provisions of law allegedly violated. Charter § 2603(h)(1); current Board rules § 2-01(a).

The financial disclosure law contains no such requirement for probable cause notices in financial disclosure litigation. Indeed, such notices have little use in such litigation, where the sole issue is whether the official filed his or her financial disclosure report (or paid his or her late fine). In addition, as a result of the large number of financial disclosure cases, the requirement of a probable cause notice imposes a substantial and unnecessary burden upon the Board's staff. For these reasons, the amendments

eliminate the requirement of probable cause notices in cases arising under the financial disclosure law. See amended Board rule § 2-01.

Certified mail. The current Board rules require that the Board serve notices, petitions, orders, and other documents both by first class mail and either by personal service or by certified mail, return receipt requested, or by fax. Current Board rules § 2-01(e). Except for petitions, which formally commence the enforcement proceeding, no reason exists for requiring that every Board document be served twice. Such a requirement is wasteful and, particularly in financial disclosure litigation, imposes a significant burden upon the Board's staff, which currently spends substantial time simply filling out forms for certified mail. Furthermore, any method of service permissible under the Civil Practice Law and Rules ("CPLR") in civil litigation should also be permissible in Board proceedings. Accordingly, the amended rule eliminates the dual service requirement, except for petitions served by mail rather than by other methods of service, and expands the methods of service to include those permitted by the CPLR. For these purposes, the amended rule treats petitions like summonses and other Board documents like interlocutory papers. Amended Board rule § 2-05(c), (d).

Applicable rules in hearings. The current Board rules are vague as to which rules apply to hearings conducted by the Board or a Board member and which apply to hearings conducted by the Office of Administrative Trials and Hearings ("OATH") at the Board's request. For example, the current provisions regulating dispositions by agreement, although set forth in the subdivision dealing with Board hearings, would appear also to apply to hearings held before OATH. See current Board rules § 2-03(b)(3). The amendments clarify these matters and also clarify that hearings may be conducted by an individual Board member designated by the Board. See amended Board rule § 2-03.

Subpoenas. The current Board rules provide that, where the Board hears the case, only the Board may issue a subpoena. The amended rules require that subpoenas be issued by a member of the Board, where the Board or a Board member is hearing the case, or by an administrative law judge, where OATH is hearing the case. See amended Board rule § 2-03(b).

Dispositions by agreement. The amended rule clarifies a number of matters relating to the disposition of a proceeding by agreement between the respondent and the Board. See amended Board rule § 2-05(h). For example, the current rule suggests that a disposition by agreement must await service of a petition (which formally commences the proceeding), even in a Chapter 68 case, although in many instances the Board may be able favorably to dispose of a case by agreement after service of the probable cause notice. The current rule also suggests that an individual Board member may

dispose of a case by agreement with the respondent, when in fact only the Board itself may dispose of a case.

The amended rule also introduces certain safeguards, based on OATH's rules, to prevent the appearance of bias as a result of settlement conferences, where the Board or a Board member is hearing the case. See amended Board rule §§ 2-03(d)(2), 2-05(h). The amended rule adopts the requirements of the OATH rules that offers of disposition are confidential and inadmissible at trial. Finally, the current rule appears to confuse a disposition by agreement and a determination by the Board that a violation of law has occurred. The Board may make such a determination of violation only after a hearing or respondent's default on a hearing or respondent's admission in response to the Board's notice of probable cause. See Charter § 2603(h)(3). After consultation with the respondent's agency head, the Board then issues an order of violation imposing or recommending penalties. A disposition by agreement, on the other hand, is an agreement between the Board and the respondent and does not involve any hearing or any determination by the Board that a violation of law has occurred. These matters have been clarified in the amended rule.

Ex parte communications. Current Board rule § 2-03(b)(5) prohibits ex parte communications between the prosecuting attorney and the Board once the Board "has determined that there is probable cause to believe that a violation of the provisions of Chapter 68 has occurred." That rule contains at least two defects. First, it is unclear whether "determined" refers to the initial determination of probable cause or the sustaining of probable cause. Second, the rule has proven unnecessarily cumbersome and an impediment to disposition of cases by agreement. The amended rule clarifies that the prohibition against ex parte communications comes into play once the petition is served, that the prohibition only applies to communications concerning the merits of the case, and that ex parte communications are permitted on ministerial matters, in an emergency, or with the consent of the respondent. Amended Board rule § 2-05(g).

Reorganization of rules. The current Board hearing rules contain provisions of general application within rules governing specific matters. For example, the provisions on service of documents and computation of time are contained in the rule on the initial determination of probable cause. Current Board rule § 2-01(e), (f). The provisions on disposition by agreement and ex parte communications are set out in the rule on hearings. Current Board rule § 2-03(b)(3), (b)(5). The amended rule collects these provisions that address matters dealing with Board proceedings generally into Board rule § 2-05, which currently addresses only confidentiality. The rule on hearings is also reorganized. See amended rule § 2-03. Specifically, that amended rule is divided into four subdivisions: conduct of hearings generally, subpoenas, conduct of hearings by OATH, and conduct of hearings by the Board

or a Board member. The provisions of the current rule § 2-03 are incorporated into the appropriate subdivision in the amended rule.

Technical amendments. The Board's rules are clarified by a number of technical amendments, including:

- Measuring time periods in all cases from the service of a document (amended rule §§ 2-01(a), 2-02(c)(1), 2-04(a));
- Setting out a provision, modelled on CPLR 2103(b)(2), for uniform extensions of time to serve documents in response to documents served by mail (amended Board rule § 2-05(e));
- Clarifying that leave for permission to amend a pleading may be granted by the person or entity conducting the hearing (amended Board rule § 2-02(d)) (this change was proposed by the Board during the commenting period);
- Deleting unnecessary cross-references to the OATH rules (current Board rule §§ 2-03(a)(1)-(3), (b)(1), (5));
- Clarifying that Board consultation with an agency head is not required in financial disclosure cases, only in Chapter 68 cases (amended Board rule § 2-04(b));
- Establishing procedures, based on OATH's rules, for appearances and substitution of counsel (amended Board rule § 2-05(a), (b));
- Changing "legal holiday" to "public holiday" to conform to General Construction Law § 24 and changing the provision on extensions of time where a deadline falls on a non-business day to conform to General Construction Law § 25-a (amended Board rule § 2-05(e)); and
- Specifying that OATH's rules yield to a contrary Board rule (amended Board rule § 2-05(i)).

The foregoing amendments to the Board hearing rules should streamline and substantially aid the Board in its enforcement efforts.

[COIB13: 2-01.fin]

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).

New York City Conflicts of Interest Board

Notice of Adoption

NOTICE IS HEREBY GIVEN PURSUANT TO AUTHORITY VESTED IN THE NEW YORK CITY CONFLICTS OF INTEREST BOARD by Sections 1043 and 2603 of the New York City Charter and Sections 3-228, 3-907, and 3-1106 of the New York City Administrative Code that the Conflicts of Interest Board has amended Chapter 2 of Title 53 of the Rules of the City of New York to update its procedural rules for enforcement actions.

The proposed Rules were published in the City Record on November 17, 2023, and a public hearing was held on December 20, 2023. After consideration of the written comment received, the Conflicts of Interest Board now adopts the following Rules.

Statement of Basis and Purpose

In 2019, the Conflicts of Interest Board (the “Board”) comprehensively revised Chapter 2 of the Rules of the Board, which governs the Board’s enforcement process, “both to reflect its current enforcement process and to improve, where needed, various aspects of that process.” Board Rules Chapter 2, Statement of Basis and Purpose (City Record, August 30, 2019). With four years of additional perspective on how Chapter 2 works in practice, the Board clarifies and updates these procedures.

1. Applicability of Chapter 2 to the Annual Disclosure Law

In its 2019 revisions to Chapter 2, the Board eliminated references to the Annual Disclosure Law, Administrative Code § 12-110. The Board subsequently codified in Board Rules § 4-07 procedures for assessing penalties against annual disclosure filers who submit late reports in violation of Administrative Code § 12-110(g)(1). However, for intentional violations of the Annual Disclosure Law, identified in Administrative Code § 12-110(g)(2), such as failure to include or misstatement of assets or liabilities, the Board has historically utilized the same process as it does for the enforcement of Chapter 68 violations, usually by adding alleged violations of the Annual Disclosure Law to a Chapter

68 violation. Accordingly, the Board reinserts a reference to Administrative Code § 12-110(g)(2) so that the procedures contained in Chapter 2 apply to enforcement of that provision in the Annual Disclosure Law. See Board Rules § 2-01(a)(5).

2. Order of Closing Statements

Prior to 2019, former Board Rules § 2-03(d)(3) provided that closing statements at a hearing “shall be made first by the [respondent].” The 2019 amendments to Board Rules Chapter 2 switched this order to provide that “[t]he enforcement attorney will make a closing statement first, after which the respondent may make a closing statement.” Board Rules § 2-03(f)(4). This amendment is inconsistent with standard trial practice. The Board reorders closing statements so that the respondent or respondent’s representative has the opportunity to give a closing statement first, followed by the enforcement attorney, with the ALJ able to modify this order on motion for good cause shown. See Board Rules § 2-03(f)(4). The amendment conforms the Board’s procedures to the standard trial practice of giving the party with the burden of proof the final word.

3. Page Limit for Written Statements

There is presently no page limit for a written closing statement submitted in lieu of an oral closing statement, a comment to the Administrative Law Judge’s (“ALJ’s”) Report and Recommendation, or a response to the other party’s comment. The Board adopts a limit of 30 double-spaced pages for written closing statements or comments to the ALJ’s Report and Recommendation and 15 double-spaced pages for a response to the other party’s comment on the Report and Recommendation, with the ALJ able to modify this length on motion for good cause shown. This rule mirrors the page limits contained in the

Federal Rules of Appellate Procedure. See Board Rules § 2-03(f)(4); Fed. R. App. P. 32(a)(7)(A).

4. Ex Parte Communications

Board Rules § 2-03(c) retains the Board's longstanding prohibition of *ex parte* communications by the enforcement attorney with the Board or counsel to the Board when the Board reviews the OATH Report and Recommendation and makes its final determination. The Board extends this prohibition to *ex parte* communications by the respondent or respondent's representative with the Board or counsel to the Board, communications that the Board had previously discouraged without prohibiting. See Board Rules § 2-03(c).

5. Garnishment of City Wages to Collect Penalty

The amendment to Board Rules § 2-03(j)(4) recognizes that, among the methods available to the Board for obtaining a penalty, the Board may seek garnishment of the wages of the respondent if the respondent is a current City employee. See Board Rules § 2-03(j)(4).

6. Clarifying Edits

Finally, the Board adopts two categories of clarifying edits to make Chapter 2 more user-friendly: organizational edits so that the order of the sections follows the chronology of a case and descriptive edits to assist respondents and their representatives in understanding the enforcement process.

Text of Adopted Rule

New material is underlined.

[Deleted material is bracketed.]

Chapter 2 of Title 53 of the Rules of the City of New York is amended to read as follows:

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); and

(5) § 12-110(g)(2) of the Administrative Code (the Annual Disclosure 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 officials, 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] person or firm alleged to have violated a law identified in subsection (a) of this section.

§ 2-02 [Informal Proceedings] Notices of Probable Cause and Pre-Hearing Procedures.

(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)] 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]before it files a petition at OATH.

(2) Upon oral or written request within [twenty (20)] 20 days from the date of service of the Notice, the respondent will be granted a [thirty- (30-) day] 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] 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]*Sustaining probable cause.

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

[2](ii) 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.

(2) If the Board sustains its initial determination of probable cause against a respondent who is not entitled to disciplinary rights as described in Charter § 2603(h)(2), the Board will file a Petition at OATH against the respondent pursuant to Board Rules § 2-03(b)(1).

(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]a law identified in Board Rules § 2-01(a); 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]a law identified in Board Rules § 2-01(a).
- (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]Enforcement Hearings and Post-Hearing Procedures.

(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 at OATH.*

(1) The Board will [commence formal proceedings at OATH by serving]serve 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]parte communications[with the Board].*

(1) After service of the [Notice of Petition and]Petition pursuant to Board Rules § 2-03(b)(1), the respondent, respondent's representative, or any [Board]enforcement 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] The respondent, respondent's representative, or 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]opposing party; 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. The OATH Rules govern the procedures for a Notice of Appearance, withdrawal, or substitution of the 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]Board 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 or respondent's representative 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 or respondent's representative may present evidence. The enforcement attorney may present rebuttal evidence.
- (4) The [enforcement attorney]respondent or respondent's representative will make a closing statement first, after which the [respondent may]enforcement attorney will make a closing statement. Written closing statements may not exceed 30 double-spaced pages. The order and length of the closing statements may be modified by the OATH ALJ on motion for good cause shown.

(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]admitted into [the record]evidence, 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)]20 days from the date of the OATH report, each party may submit a comment to the Board, which may not exceed 30 double-spaced pages, 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, which may not exceed 15 double-spaced pages, within [thirty (30)]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]only consider [new]evidence [submitted in a comment or in a response to a comment]admitted at trial.

(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]admitted 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]a law identified in Board Rules § 2-01(a). 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]a law identified in Board Rules § 2-01(a), 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 email or 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)]30 days of the date of service. If the respondent does not pay the full monetary penalty amount, the Board will [refer the matter]pursue all remedies, which may include garnishment of City wages or referral 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]laws identified in Board Rules § 2-01(a), 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).