



# CITY OF NEW YORK CONFLICTS OF INTEREST BOARD

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## Political Activities

**Charter Sections:** 50(a), 50(c), 51, 93(h), 97(a), 97(c), 553(a), 558(b), 734, 735(a), 735(b), 813(b), 851, 854(d), 854(e), 854(f), 854(h), 870, 871(a), 871(b), 1052(a), 1054(a), 1054(b), 1054(c), 1524(1), 2101(a), 2101(b)(6), 2601(1), 2601(19), 2604(b)(12), 2604(b)(15), 3005

**Administrative Code:** 12-110(b), 12-110(b)(3)(a)(1), 12-306(e), 12-309(a)

**Board Rules:** 1-02(a), 1-02(a)(2), 1-02(a)(3), 1-03

**Opinions Cited:** 2003-5

## Advisory Opinion No. 2017-3

Public servants who are charged with substantial policy discretion are subject to the prohibitions on political fundraising and holding political positions contained in Chapter 68 of the New York City Charter, the City's conflicts of interest law. See Charter Sections 2604(b)(12) and 2604(b)(15). The Conflicts of Interest Board (the "Board") has received a request for advice from a high-level public servant asking whether the members of 14 specific boards, commissions, and committees are public servants charged with substantial policy discretion within the meaning of Chapter 68 and related Board Rules. The 14 boards, commissions, and committees discussed herein comprise only a fraction of the boards, commissions, and

committees that are part of City government, many of whose members already have been deemed to be public servants charged with substantial policy discretion.<sup>1</sup>

As set forth more fully herein, the Board has concluded that of the 14 boards, commissions, and committees of the City about which the Board has received the instant request for advice, members of the following 11 are public servants charged with substantial policy discretion: (1) the Audit Committee; (2) the Banking Commission; (3) the Business Integrity Commission; (4) the Civil Service Commission Screening Committee; (5) the Board of Collective Bargaining; (6) the Deferred Compensation Board; (7) the Districting Commission; (8) the Board of Health; (9) the Mayor's Advisory Committee on the Judiciary; (10) the Office of Payroll Administration Board of Directors; and (11) the Public Design Commission. The Board further concludes that the members of the following three advisory committees do not exercise substantial policy discretion by virtue of their advisory committee service: (1) the Archival Review Board; (2) the Interagency Coordinating Council; and (3) the Voter Assistance Advisory Committee.

## **I. Relevant Law**

Charter Section 2601(19) defines public servants as “all officials, officers and employees of the city, including members of community boards and members of advisory committees, except for

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<sup>1</sup> Board Rules § 1-02(a)(2) requires each agency to file annually with the Board, no later than February 28 of each year, a list of public servants in their agencies who have substantial policy discretion. Pursuant to this Rule, the following boards and commissions have heretofore been identified as having members who are public servants charged with substantial policy discretion: the Board of Certification, the Board of Correction, the Board of Standards and Appeals, the Campaign Finance Board, the City Planning Commission, the Civil Service Commission, the Civilian Complaint Review Board, the Electrical Advisory Board, the Electrical Code Revision and Interpretation Committee, the Electrical License Board, the Environmental Control Board, the Equal Employment Practices Commission, the Franchise Concession Review Committee, the Human Rights Commission, the Landmarks Preservation Commission, the Loft Board, the Master Plumber & Fire Suppression Piping Contractor License Board, the Panel for Education Policy, the Rent Guidelines Board, the Tax Commission, the Taxi and Limousine Commission, and the Water Board. In addition, several City agencies are led by boards or commissions whose members are charged with substantial policy discretion, including the Health + Hospitals Corporation, the Housing Development Corporation, the New York City Housing Authority, the New York City Employee Retirement System, the Police Pension Fund, the School Construction Authority, and the Teachers' Retirement System. The members of the Conflicts of Interest Board are also charged with substantial policy discretion.

unpaid members of advisory committees.” Charter Section 2601(1), in turn, defines an advisory committee as “a committee, council, board or similar entity constituted to provide advice or recommendations to the city and having no authority to take a final action on behalf of the city or take any action which would have the effect of conditioning, limiting or requiring any final action by any other agency, or to take any action authorized by law.”

Charter Section 2604(b)(12) prohibits any non-elected public servant who is a deputy mayor, agency head, or charged with substantial policy discretion as defined by rule of the Board from directly or indirectly requesting “any person to make or pay any political assessment, subscription or contribution for any candidate for an elective office of the city or for any elected official who is a candidate for any elective office.”

Charter Section 2604(b)(15) prohibits any elected official, deputy mayor, deputy to a citywide or boroughwide elected official, agency head, or public servant charged with substantial policy discretion as defined by rule of the Board from serving as “a member of the national or state committee of a political party, an assembly district leader of a political party, a chair or officer of the county committee or county executive committee.”<sup>2</sup>

Board Rules § 1-02(a) states that, for purposes of Charter Sections 2604(b)(12) and 2604(b)(15), “a public servant is deemed to have substantial policy discretion if he or she has major responsibility in connection with determining important agency matters.” Board Rules § 1-02(a) further states, by way of example, that public servants charged with substantial policy discretion “include, but are not limited to, agency heads, deputy agency heads, assistant agency heads,

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<sup>2</sup> In contrast to all other public servants charged with substantial policy discretion, a Council Member may serve as an assembly district leader or to hold a lesser political office as defined Board Rules § 1-03. See Charter Section 2604(b)(15).

members of boards and commissions, and public servants in charge of any major office, division, bureau or unit of an agency.”

## **II. Application**

The Board has been asked whether the members of 14 specific boards, commissions, and committees are charged with substantial policy discretion within the meaning of Board Rules § 1-02(a). The Board examines each entity in turn below.

It is often the case that the public servants who serve on boards, commissions, and committees are necessarily charged with substantial policy discretion by virtue of their other City positions. See Board Rules § 1-02(a). Nevertheless, the Board is advised that those public servants, often an elected official or agency head, will frequently designate a subordinate public servant to serve in his or her stead. The Board determines that such a designee to a board, commission, or committee will himself or herself have substantial policy discretion if the board, commission, or committee itself “exercises independent judgment in connection with determining important agency matters.” See Board Rules § 1-02(a).

### *I. Archival Review Board*

The Archival Review Board, as part of the New York City Department of Records and Information Services (“DORIS”), consists of two appointees of the Council Speaker, two appointees of the Mayor, and the Commissioner of DORIS, who serves as chair. See Charter Section 3005. The Archival Review Board has the authority to issue an annual report to the Mayor that reviews the archival processing of City papers. To this end, the Archival Review Board may request and receive assistance from DORIS as may be necessary, and a member of the Archival Review Board has access, during work hours, to inspect and review any appraisal, organization, processing, or archiving of City records in the custody of an entity with which DORIS has entered into an

agreement to house City records. See id. As “a ... board ... constituted to provide advice or recommendations to the city,” the Archival Review Board is an advisory committee within the meaning of Charter Section 2601(1) and its members, in undertaking their duties on the Archival Review Board, do not exercise substantial policy discretion within the meaning of Board Rules § 1-02(a).

## *2. Audit Committee*

The Audit Committee consists of the Mayor, Comptroller, Public Advocate, and four private members appointed by the Mayor, two of whom upon recommendation by the Comptroller. See Charter Section 97(a). Because Charter Section 97(c) grants the Audit Committee the authority to approve or disapprove the Comptroller’s suspension or withdrawal of authority delegated to an agency pursuant to Charter Section 93(h) and to select a firm or firms to perform the City’s annual audit, its members have substantial policy discretion within the meaning of Board Rules § 1-02(a).

## *3. Banking Commission*

The Banking Commission consists of the Mayor, the Comptroller, and the Commissioner of the New York City Department of Finance. See Charter Section 1524(1). Because Charter Section 1524(1) grants the Banking Commission the authority to designate the banks or trust companies in which all moneys of the City shall be deposited, its members have substantial policy discretion within the meaning of Board Rules § 1-02(a).

## *4. Business Integrity Commission*

The Business Integrity Commission consists of the Commissioners of the New York City Department of Small Business Services, the New York City Department of Consumer Affairs, the New York City Department of Investigation, the New York City Police Department, the New York City Department of Sanitation, and a full-time chair appointed by the Mayor. See Charter Section

2100. Because Charter Section 2101(a) authorizes the Business Integrity Commission to regulate the trade waste industry, the shipboard gambling industry, the Fulton Fish Market distribution area, other seafood distribution areas, and public wholesale markets, and Charter Section 2101(b)(6) authorizes the Business Integrity Commission to adopt rules to carry out such regulatory authority, its members have substantial policy discretion within the meaning of Board Rules § 1-02(a).

*5. Civil Service Commission Screening Committee*

The Civil Service Commission Screening Committee consists of six members, four appointed by the Mayor and two appointed by the Municipal Labor Committee. See Charter Section 813(b). Upon the occurrence of any vacancy on the Civil Service Commission, the Civil Service Commission Screening Committee “submit[s] to the mayor a list of nominees, which shall include persons with knowledge or experience of the civil service system, or personnel management, or compensation practices, from which the mayor shall make appointments” to the Civil Service Commission. Id.

While Board Rules § 1-02(a) states that members of “boards and commissions” are charged with substantial policy discretion, it is silent as to whether members of screening committees are similarly charged with substantial policy discretion. Charter Section 2601(1), on the other hand, defines an “advisory committee” as one that has “no authority to ... take any action which would have the effect of conditioning, limiting or requiring any final action by any other agency” Applying that definition here, the Board concludes that, because the Civil Service Commission Screening Committee limits the final action of the Mayor in filling vacancies on the Civil Service Commission, the Civil Service Commission Screening Committee is a board or commission rather than an advisory committee, pursuant to Charter Section 2601(1), and its members exercise substantial policy discretion within the meaning of Board Rules § 1-02(a).

*6. Board of Collective Bargaining*

The Board of Collective Bargaining consists of seven members, two City members appointed by the Mayor, two labor members appointed by the Municipal Labor Committee, and three impartial members who are elected by the unanimous vote by the City and labor members. See id. In addition to these members, two appointees of the Mayor serve as alternate City members and two appointees of the Municipal Labor Committee serve as alternate labor members. See Charter Section 1171. The Board of Collective Bargaining has several powers established by law, including rulemaking authority and the authority to render a final determination on a petition alleging that a public employer or its agents, or a public employee organization or its agents, has engaged in or is engaging in an improper labor practice. See Administrative Code §§ 12-306(e) and 12-309(a). As a result, the members and alternates of the Board of Collective Bargaining are charged with substantial policy discretion within the meaning of Board Rules § 1-02(a).

*7. Deferred Compensation Board*

Established by Mayoral Executive Order No. 158 (2011), the Deferred Compensation Board consists of the Mayor, the Comptroller, the Director of the Office of Management and Budget, the Commissioner of the Department of Citywide Administrative Services, the Commissioner of the Department of Finance, the Commissioner of Labor Relations, the Police Commissioner, the Fire Commissioner, and two appointees of the Municipal Labor Committee. Because the Deferred Compensation Board serves as trustee of the City's deferred compensation plan and invests funds pursuant to that plan, its members exercise substantial policy discretion within the meaning of Board Rules § 1-02(a).

*8. Districting Commission*

The Districting Commission consists of fifteen members chosen by the Mayor and by Council delegations of the political parties that have the two largest delegations in the Council. See Charter Section 50(a). Because Charter Section 51 gives the Districting Commission authority to establish a plan for dividing the City into districts for the election of Council Members, its members have substantial policy discretion within the meaning of Board Rules § 1-02(a).<sup>3</sup>

*9. Board of Health*

The Board of Health consists of the Commissioner of the New York City Department of Health and Mental Hygiene (“DOHMH”), who sits as Chair, and ten members appointed by the Mayor. See Charter Section 553(a). Because Charter Section 558(b) grants the Board of Health the authority to add to, alter, amend, or repeal any part of the Health Code, which may embrace all matters and subjects to which the power and authority of DOHMH extends, its members have substantial policy discretion within the meaning of Board Rules § 1-02(a).

*10. Interagency Coordinating Council*

The Interagency Coordinating Council, which is part of the New York City Department of Youth and Community Development (“DYCD”), consists of representatives of each City agency providing services to youth, a representative of the City Council appointed by the Council Speaker, and representatives of the Youth Board established by Charter Section 734. See Charter Section 735(a). The DYCD Commissioner serves as Director of the Interagency Coordinating Council, while the Mayor or the Mayor’s designee serves as Chair of the Interagency Coordinating Council. See id. The Interagency Coordinating Council recommends how member agencies can improve the

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<sup>3</sup> Members of the Districting Commission cease having substantial policy discretion at the conclusion of their terms, which by Charter Section 50(c) end sixty days after the first general election of the Council following the adoption of a districting plan.

delivery of services to youth, considers proposals to improve services to youth, conducts an annual youth services needs assessment, formulates a plan for delivery of community-based services to youth, and issues an annual report to the Council and the Mayor. See Charter Section 735(b). Members of the Interagency Coordinating Council do not, in this capacity, have the authority to take a final action on behalf of the City and therefore do not exercise substantial policy discretion within the meaning of Board Rules § 1-02(a) in undertaking their duties as members of the Interagency Coordinating Council.

*11. Mayor's Advisory Committee on the Judiciary*

The Mayor's Advisory Committee on the Judiciary consists of 19 members appointed by the Mayor, with four of the Mayor's appointments made at the recommendation of the Chief Judge of the New York Court of Appeals, two appointments made at the recommendation of each of the Presiding Justices of the Appellate Division for the First and Second Judicial Departments, and two appointments made at the recommendation of deans of law schools within the City. See Mayoral Executive Order No. 4 (2014). The Mayor's Advisory Committee on the Judiciary screens candidates for appointment by the Mayor for vacant judicial offices and presents a list of candidates to the Mayor, from which the Mayor has bound himself to make a selection. See id. The Mayor's Advisory Committee also recommends to the Mayor whether a judge should be reappointed. See id.

Like members of the Civil Service Commission Screening Committee, members of the Mayor's Advisory Committee on the Judiciary limit the final action of the Mayor in filling judicial vacancies.<sup>4</sup> Similarly, the Mayor's Advisory Committee on the Judiciary is a board or commission

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<sup>4</sup> The Board's conclusion is dependent on Executive Order No. 4 (2014), by which the Mayor has limited his discretion in making judicial appointments.

rather than an advisory committee, pursuant to Charter Section 2601(1), and its members exercise substantial policy discretion within the meaning of Board Rules § 1-02(a).

*12. Office of Payroll Administration Board of Directors*

The New York City Office of Payroll Administration (“OPA”) is headed by a two-person Board of Directors appointed by the Mayor, one of whom is appointed upon recommendation of the Comptroller. See Charter Section 870. Charter Section 871(b) requires all City agencies to cooperate with OPA to ensure efficient operation of the payroll management system, and Charter Section 871(a) provides OPA with the authority to develop uniform procedures for payroll processing and development for all City agencies. Accordingly, members of the Board of Directors of OPA are charged with substantial policy discretion within the meaning of Board Rules § 1-02(a).

*13. Public Design Commission*

The Public Design Commission, formerly called the Art Commission, consists of the Mayor, the President of the Metropolitan Museum of Art, the President of the New York Public Library, the President of the Brooklyn Museum, and seven members appointed by the Mayor from a list of candidates submitted by the Fine Arts Federation of New York. See Charter Section 851. Pursuant to Charter Section 854(d), no work of art can become the property of the City without approval of the Public Design Commission. Similarly, the Public Design Commission must approve the design of any construction project on land belonging to the City exceeding \$1 million, except those under the jurisdiction of the New York City Landmarks Preservation Commission. See Charter Sections 854(e), 854(f), and 854(h). Accordingly, members of the Public Design Commission are charged with substantial policy discretion within the meaning of Board Rules § 1-02(a).

*14. Voter Assistance Advisory Committee*

In Advisory Opinion No. 2003-5, the Board determined that members of the Voter Assistance Commission, as it was then named, were public servants charged with substantial policy discretion within the meaning of Board Rules § 1-02(a) because, at that time, it had the power to appoint a City official, a coordinator, who could promulgate City rules. Since then, the Charter has been amended to rename it as the Voter Assistance Advisory Committee and, more importantly for purposes of considering whether its members are charged with substantial policy discretion, limit its powers. Pursuant to Charter Section 1054(a), the Voter Assistance Advisory Committee consists of the Public Advocate, the Executive Director of the Board of Elections, and seven appointed members: two appointed by the Mayor, provided that not more than one such member shall be enrolled in any one political party; two appointed by the Council Speaker, provided that not more than one such member shall be enrolled in any one political party; one appointed by the Comptroller; one appointed collectively by the Borough Presidents; and the chair appointed by the Mayor in consultation with the Council Speaker. The Voter Assistance Advisory Committee is charged with advising and assisting the New York City Campaign Finance Board, which runs the City's campaign finance program, with undertaking its responsibilities to encourage and facilitate voter registration, to increase the rate of voter registration and voting among underrepresented groups, and to hold public hearings on this topic, done in cooperation with non-partisan voter registration groups. The Voter Assistance Advisory Committee does not have independent authority to take any final agency action. See Charter Sections 1052(a), 1054(b), and 1054(c). Accordingly, the members of the Voter Assistance Advisory Committee do not, in this capacity, exercise substantial policy discretion within the meaning of Board Rules § 1-02(a).

### **III. Conclusion**

Of the 14 boards, commissions, and committees of the City about which the Board has received the instant request for advice, members of the following 11 are public servants charged with substantial policy discretion: (1) the Audit Committee; (2) the Banking Commission; (3) the Business Integrity Commission; (4) the Civil Service Commission Screening Committee; (5) the Board of Collective Bargaining; (6) the Deferred Compensation Board; (7) the Districting Commission; (8) the Board of Health; (9) the Mayor's Advisory Committee on the Judiciary; (10) the Office of Payroll Administration Board of Directors; and (11) the Public Design Commission. As public servants charged with substantial policy discretion, the members of these boards, commissions, and committees may not directly or indirectly request any person to make or pay any political assessment, subscription, or contribution for any candidate for an elective office of the City or for any City elected official who is a candidate for any elective office. See Charter Section 2604(b)(12). In addition, the members of these boards, commissions, and committees may not serve as a member of the national or state committee of a political party, an assembly district leader of a political party, or a chair or officer of the county committee or county executive committee of a political party. See Charter Section 2604(b)(15).<sup>5</sup>

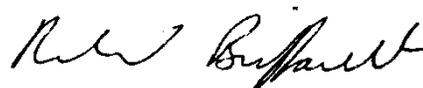
Board Rules § 1-02(a)(3) requires each agency to notify in writing the public servants who are charged with substantial policy discretion of the restrictions set forth in Charter Sections 2604(b)(12) and 2604(b)(15). Pursuant to this Board Rule, each agency shall promptly notify the

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<sup>5</sup> In addition to these restrictions on political activities, Administrative Code § 12-110(b)(3)(a)(1) requires each member of any board or commission who holds a policymaking position to file the appropriate annual disclosure report pursuant to Administrative Code § 12-110(b).

members of these 11 boards, commissions, and committees that they are charged with substantial policy discretion.

The Board further concludes that the following are advisory committees and thus their members do not exercise substantial policy discretion: (1) the Archival Review Board; (2) the Interagency Coordinating Council; and (3) the Voter Assistance Advisory Committee. Accordingly, the members of these advisory committees are not subject to the restrictions on political activities set forth in Charter Sections 2604(b)(12) and 2604(b)(15) by virtue of their service on these advisory committees.



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Dated: August 8, 2017