

STAFF DRAFT PROPOSED BOARD RULES

Chapter 3: Organizations Affiliated with Elected Officials

Board Rules § 3-01. Definitions.

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Board Rules § 3-04. Annual Reporting by an Organization Affiliated with an Elected Official.

Board Rules § 3-05. Record Retention.

Board Rules § 3-01. Definitions.

(1) This chapter incorporates the definitions appearing in Administrative Code § 3-901.

Commentary: *This chapter applies and implements Administrative Code §§ 3-901 to 3-907, so this proposed subdivision would incorporate the definitions used in those sections of the Administrative Code to apply equally to the regulations implementing those sections of the Administrative Code.*

(2) *In-kind donation.* The term “in-kind donation” to an organization affiliated with an elected official in this Chapter and in Administrative Code §§ 3-901 to 3-907 means: (a) any gift, loan, advance of, or payment for, anything of value, other than money, made to or for the organization by a non-governmental source; or (b) the payment by any non-governmental source for the personal services of another person that is rendered to the organization affiliated with an elected official without charge to the organization. “In-kind donation” does not include personal services provided without compensation by

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individuals volunteering their time on behalf of the organization on matters outside of their professional expertise.

Commentary: *Local Law 181 defines “donation” as “any contribution from a non-governmental source, including in-kind donations, gifts, loans, advances or deposits of money, or anything of value.” See Administrative Code § 3-901. “In-kind donation” is not defined in Local Law 181, even though it is included in the broader definition of “donation” provided in Administrative Code § 3-901. Subdivisions (a) and (b) of this definition apply the definition of “in-kind contribution” contained in Campaign Finance Board Rule § 1-02 and, in addition, recognize that Administrative Code § 3-901 excludes governmental sources from the definition of donations, whether in-kind or otherwise.*

The proposed definition of “in-kind donation” excludes personal services provided without compensation by individuals who are volunteering their time on behalf of the organizations on matters outside of their professional expertise. There are a couple of points to note with this exclusion. First, this exclusion applies only to uncompensated work. If the volunteer receives any compensation—whether from the organization or from anyone else—the services provided are in-kind donations. Therefore, if a company volunteer program authorizes its employees to volunteer for an organization on company time, then the volunteer work does not satisfy this exclusion and is an in-kind donation by the company. Second, the exclusion applies only to work on matters outside of the volunteer’s professional expertise. In other words, the exclusion does not apply to the pro-bono legal services of an attorney or to the pro-bono graphic design services of a professional graphic designer. This distinction is necessary to provide a rigorous calculation of whether an organization’s expenditures on elected official communications—which are often produced and disseminated through the personal services of

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professionals—exceed 10% of its total expenditures for purposes of Administrative Code §§ 3-902(a)(9) and 3-903.

(3) *Restricted organization.* The term “restricted organization” means an organization affiliated with an elected official that either:

(a) spent at least 10% of its expenditures on elected official communications in the previous calendar year; or

(b) reasonably expects to spend at least 10% of its expenditures on elected official communications in the current calendar year.

(4) *Unrestricted organization.* The term “unrestricted organization” means an organization affiliated with an elected official that did not spend in the previous calendar year, and that does not reasonably expect to spend in the current calendar year, at least 10% of its expenditures on elected official communications.

Commentary: *Subdivisions (3) and (4) create and define the terms “restricted organization” and “unrestricted organization” for purposes of the reporting requirements of Administrative Code § 3-902(a) and Board Rules 3-03. All organizations affiliated with an elected official will be either a “restricted organization” or an “unrestricted organization” for the purposes of this reporting requirement, and the reporting requirement is different for each type of organization. The content of the definitions is from Administrative Code § 3-902(a)(9), which requires an organization affiliated with an elected official that “did not spend or reasonably expect to spend at least 10% of their expenditures in the previous or current calendar year on elected official communications” to certify that the organization did not do so.*

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Board Rules § 3-02. Procedures for Obtaining a Determination by the Board that an Elected Official or an Agent of an Elected Official Does Not Exercise Control over an Entity.

For purposes of Administrative Code § 3-904(c), a non-profit entity may apply to the Board for a formal determination that an elected official or an agent of an elected official does not exercise control over the entity. Such an application must be in writing, signed by an agent of the not-for-profit entity, and provide detailed explanation of the underlying facts that show why, consistent with the considerations included in the definition of “organization affiliated with an elected official” set forth in Administrative Code § 3-901 and Board Rules § 3-03, the entity should not be considered an “organization affiliated with an elected official.”

Commentary: *This proposed rule implements Administrative Code § 3-904(c) and provides a procedure by which a non-profit entity may apply to the Board for a formal determination of whether an elected official exercises control over the entity.*

Board Rules § 3-03. Factors by which the Board Shall Determine Whether an Entity is Affiliated with an Elected Official.

For purposes of Administrative Code § 3-901, in determining whether a person holding office as mayor, comptroller, public advocate, borough president or member of the council, or an agent or appointee of such a person, exercises control over a non-profit entity, the Board shall consider the totality of the circumstances, including:

- (a) whether the organization was created by such an elected official or the official’s agent, or by an individual who was previously employed by, or was a paid political consultant of, the elected official, and, if so, how recently such organization was created;

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- (b) whether the board of the organization is chaired by such an elected official or the official's agent;
- (c) whether board members appointed by such an elected official or the official's agent serve for terms or are appointed only upon nomination of other individuals or entities that are not agents of such elected official;
- (d) the degree of involvement or direction by such an elected official or the official's agent in such organization's policies, operations, and activities;
- (e) the degree to which public servants, acting under the authority or direction of the elected official or an agent of the elected official, perform duties on behalf of the organization as part of their official City employment; and
- (f) the purpose of the organization.

Commentary: *The definition of "organization affiliated with an elected official," as set forth in Administrative Code § 3-901, contains factors that the Board considers in determining whether an entity is affiliated with an elected official and authorizes the Board to promulgate by rule additional factors to aid in its determination.*

This rule replicates the factors contained in Administrative Code § 3-901 and establishes additional factors that further define what indicia of control the Board will consider in determining whether a non-profit entity is affiliated with an elected official. Proposed subdivisions (a) and (b) repeat the factors contained in Administrative Code § 3-901(i) and (ii). Proposed subdivision (c) expands the factor contained in Administrative Code § 3-901(iii) by looking not only to the appointment of an organization's board members by the elected official, but also to the appointment of an organization's board members by an agent of the elected official. Similarly, proposed subdivision (d) expands the factor contained in Administrative

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Code § 3-901(iv) by looking not only to the elected official's involvement or direction in the entity's policies, operations, and activities, but also to the involvement or direction of an agent of the elected official. Proposed subdivisions (e) and (f) contain new factors. Pursuant to proposed subdivision (e), the Board will consider the extent to which public servants act on behalf of the entity as part of their City employment. Pursuant to proposed subdivision (f), the Board will consider the purpose of the entity.

The inclusion of an agent of an elected official to proposed subdivisions (c) and (d) reflects the consideration—already existing in proposed subdivisions (a) and (b)—that an elected official can exercise control of an organization through his or her agent. Proposed subdivision (e) reflects the consideration that public servants acting in their official capacities on behalf of an organization will frequently be acting under the authority of an elected official or agent of an elected official. Proposed subdivision (f) reflects the Board's longstanding principle that an organization's purpose determines its relationship to the City. In every case, and as directed by Administrative Code § 3-901, the Board will consider the totality of the circumstances regarding the entity at issue.

Board Rules § 3-04. Annual Reporting by Organizations Affiliated with an Elected Official.

Pursuant to Administrative Code § 3-902, all organizations affiliated with an elected official shall submit the reporting required pursuant to Administrative Code § 3-902(a) on the Board's website, no later than August 1 for the previous calendar year, as follows.

(a) Reporting Requirements for Restricted Organizations

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- (1) A restricted organization shall submit the information listed in Administrative Code §§ 3-902(a)(1) to 3-902(a)(8).

Commentary: *This subdivision explains what information Administrative Code § 3-902(a) requires a restricted organization to submit as part of its annual reporting. Administrative Code § 3-902(a)(9), by its express terms, applies only to unrestricted organizations.*

- (2) To comply with the reporting requirement of Administrative Code §§ 3-902(a)(6) and 3-902(a)(7), a restricted organization shall report for each donation received during the previous calendar year:

- (i) the name of any donor with business dealings with the City;
- (ii) whether the donor had business dealings with the City on the date of such donation;
- (iii) if not, whether the donor was added to the doing business database within 180 days after the receipt of such donation;
- (iv) the name of any donor who made a donation with a reasonable value of \$1,000 or more;
- (v) the city and state of residence of the donor;
- (vi) the date of each donation;
- (vii) the value of each donation;
- (viii) the value of any excess donation refunded pursuant to Administrative Code §§ 3-903(a) or 3-903(b); and

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(ix) the date of any excess donation refunded pursuant to Administrative Code §§ 3-903(a) or 3-903(b).

Commentary: *This subdivision explains further the requirement for restricted organizations, pursuant to Administrative Code §§ 3-902(a)(6) and 3-902(a)(7), to report to the Board “the names of any people who such organization knows had business dealings with the city on the date of such donation, or who were added to the doing business database within 180 days after the receipt of such donation, who made a donation to the organization during the previous calendar year, if any, and the city and state of residence, dates of donation, and value of donation of any such people” and “the names of any other individuals...who made a donation with a reasonable value of \$1,000 or more to the organization during the previous calendar year.” In reading this requirement in conjunction with Administrative Code §§ 3-903(a) and 3-903(b), the Board concludes that a restricted organization must also report the return of any prohibited donations by a person with business dealings with the City—to include that person’s spouse, domestic partner, or unemancipated child as provided in Administrative Code § 3-901—the date and value of the prohibited donation, and the date and value of the refund.*

(3) Multiple donations made by the same person doing business with the City in the same calendar year are considered in the aggregate for purposes of Administrative Code §§ 3-902(a)(7), 3-903(a), and 3-903(b).

Commentary: *This proposed subdivision clarifies that, for purposes of Administrative Code §§ 3-902(a)(7), 3-903(a), and 3-903(b), a person’s donations are aggregated over the course of the calendar year. Thus, a restricted organization cannot accept donations in excess of \$400—whether in a single donation or in a series of donations throughout the calendar year—*

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from a person doing business with the City. Similarly, this subdivision would clarify that § 3-902(a)(7) requires reporting of all donations from an individual that, in the aggregate, total \$1,000 or more. Because Administrative Code § 3-902(a)(7) requires the organization to report “dates of donation,” all donations to be reported pursuant to this subdivision must be itemized by date and value of each individual donation.

- (4) In determining whether and when a donation must be returned pursuant to Administrative Code § 3-903(b), where a person is added to the doing business database in a calendar year and makes multiple donations to the organization that in the aggregate exceed \$400 in that calendar year, the date of receipt shall be deemed to be the date that the donor’s aggregate donations for the calendar year exceeds \$400.

Commentary: *Administrative Code § 3-903(b) requires a restricted organization to return a prohibited donation from someone who does not have business dealings with the City at the time of the donation, but who is added to the doing business database within 180 days of the donation. The refund must occur within 200 days of the donation. Where multiple donations in the aggregate exceed \$400, this proposed subdivision clarifies that the date for calculating when the organization must return any excess donation is the date that the donor’s aggregate donations for the calendar year exceed \$400. By way of example: a person donates \$250 on January 1 and \$200 on April 1. That person is added to the doing business database on May 1. Under the proposed subdivision, the restricted organization has 200 days from April 1—the date the donor’s aggregate donations exceed \$400—to return \$50, the amount that exceeds the \$400 limit now that the donor is listed in the doing business database.*

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- (5) To comply with Administrative Code § 3-902(a)(6), a restricted organization shall require a written submission pursuant to Administrative Code § 3-903(d) from every individual making a donation to the organization. This written submission need not be submitted to the Board but must be retained pursuant to Board Rules § 3-05.

Commentary: *The Board reads Administrative Code § 3-902(a)(6) in conjunction with Administrative Code § 3-903(d), which requires restricted organizations to obtain a written submission “from every individual making a donation with a reasonable value in excess of \$400 in a single calendar year,” so the restricted organization can determine whether the individual is a person with business dealings with the City. The proposed subdivision clarifies that, to comply with the requirement in Administrative Code § 3-902(a)(6) to disclose all donations, regardless of the amount, from individuals having business dealings with the City, a restricted organization must receive the written submission contemplated in Administrative Code § 3-903(d) from all donors, not just donors who are proffering donations in excess of \$400.*

- (6) To comply with the reporting requirement of Administrative Code § 3-902(a)(8), a restricted organization shall submit to the Board a list of each elected official communication created or distributed, which list shall include a description, the date, and the total cost of each such communication. In calculating the total cost of an elected official communication, a restricted organization shall include the value of all goods and services paid by the organization to create and distribute the elected official communication, including without limitation the value of the time of its employees and the value of all goods and services donated by a non-governmental source for the communication’s creation or distribution.

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Commentary: *Administrative Code § 3-902(a)(8) requires an organization to provide “an accounting of the expenditures of the organization during the previous calendar year on the production or dissemination of elected official communications, in a manner and form determined by the conflicts of interest board.” In order to account for such elected official communications, an organization must provide information regarding each individual elected official communication, including a description, the date, and the total cost of such communication. The proposed subdivision provides further guidance for an organization to calculate the cost of an elected official communication, including the time of its employees and the donations of goods and services by nongovernmental sources. Because the definition of “donation” in Administrative Code § 3-901 applies only to contributions “from a non-governmental source,” the cost of contributions made by governmental sources are not calculated into the cost of an elected official communication for purposes of Administrative Code § 3-902(a)(8).*

(b) Reporting Requirements for Unrestricted Organizations

- (1) An unrestricted organization shall submit the information listed in Administrative Code §§ 3-902(a)(1) to (a)(5) and Administrative Code §§ 3-902(a)(7) to (a)(9).

Commentary: *This subdivision explains what information Administrative Code § 3-902(a) requires an unrestricted organization to submit as part of its annual reporting requirement.*

The Board proposes that, to give Local Law 181 its intended effect, Administrative Code § 3-902(a)(6) does not apply to unrestricted organizations. Rather, Administrative Code § 3-902(a)(6) requires a restricted organization to report to the Board “the names of any people

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who such organization knows had business dealings with the city on the date of such donation, or who were added to the doing business database within 180 days after the receipt of such donation, who made a donation to the organization during the previous calendar year, if any, and the city and state of residence, dates of donation, and value of donation of any such people.”

In proposing this rule, the Board reads this requirement in conjunction with Administrative Code § 3-903(d), which requires only restricted organizations to obtain a written submission by a donor so the restricted organization can determine whether the individual is a person with business dealings with the City. Because Administrative Code § 3-903 does not similarly require unrestricted organizations to determine which of its donors have business dealings with the City, the Board believes that the requirements of Administrative Code § 3-902(a)(6) are not intended to apply to unrestricted organizations.

The Board nevertheless believes that Administrative Code § 3-902(a)(7) applies to unrestricted organizations and requires such organizations to disclose all donations of \$1,000 or more, regardless of whether the donor has business dealings with the City. The disclosure of these donations does not require the organization to obtain a statement regarding whether a donor has business dealings with the City.

- (2) To comply with the reporting requirement of Administrative Code § 3-902(a)(7), an unrestricted organization shall submit to the Board the names of any individuals who or entities that made a donation with a reasonable value of \$1,000 or more, whether in a single donation or in multiple donations. If an unrestricted organization receives multiple donations from the same individual or entity, the aggregate value of which

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has a reasonable value of \$1,000 or more, the organization shall report the date and value of every donation from that individual or entity.

Commentary: *To fulfill the intent of Administrative Code § 3-902(a)(7) that a restricted organization report all donations received from a single source totaling \$1,000 or more in a single calendar year, this subdivision would clarify that Administrative Code § 3-902(a)(7) requires reporting of all donations from an individual or entity that, in the aggregate, total \$1,000 or more. Because Administrative Code § 3-902(a)(7) requires the organization to report “dates of donation,” all donations to be reported pursuant to this subdivision must be itemized by date and value of each individual donation.*

(3) To comply with the reporting requirement of Administrative Code § 3-902(a)(8), an unrestricted organization shall submit to the Board a list of each elected official communication created or distributed, which list shall include a description, the date, and the total cost of each such communication. In calculating the total cost of an elected official communication, an unrestricted organization shall include the value of all goods and services paid by the organization to create and distribute the elected official communication, including without limitation the value of the time of its employees and the value of all goods and services donated by a non-governmental source for the communication’s creation or distribution.

Commentary: *This subdivision contains identical guidance to unrestricted organizations that proposed Board Rules § 3-03(a)(2) provides to restricted organizations.*

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- (4) To comply with the reporting requirement of Administrative Code § 3-902(a)(9), an unrestricted organization must report its total expenditures for the previous calendar year and, for the current calendar year, both total budgeted expenditures and budgeted expenditures for elected official communications.

Commentary: *Administrative Code § 3-902(a)(9) requires an unrestricted organization to certify that the organization did not spend in the previous calendar year, or does not reasonably expect to spend in the current calendar year, at least 10% of the organization's expenditures on elected official communications. In order to determine whether an organization has appropriately made such a certification, the Board needs to know four facts: (1) the organization's expenditures on elected official communications for the previous calendar year; (2) the organization's total expenditures for the previous calendar year; (3) the organization's budgeted expenditures on elected official communications for the current calendar year; and (4) the organization's budgeted total expenditures for the current calendar year. Administrative Code § 3-902(a)(8) already requires the organization to report the previous calendar year's expenditures on the production or dissemination of elected official communications. This proposed subdivision would require the organization to provide the remaining three facts to allow the Board to determine whether the organization has appropriately certified that it is an unrestricted organization.*

(c) *Privacy, Safety, and Security Requests*

- (1) Pursuant to Administrative Code § 3-902(b), an organization affiliated with an elected official may submit a request to the Board that disclosure of one or more of its donors and/or the amount of donation shall not be made public. The organization must make

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such a request in writing no later than April 1 for the previous calendar year and shall explain why the release of such information to the public may cause harm, threats, harassment, or reprisals to the donor, or to individuals or property affiliated with the donor.

Commentary: *This proposed subdivision implements Administrative Code § 3-902(b), which provides that the Board may make a determination that, based upon a review of the relevant facts presented by the reporting entity, the disclosure of certain donor information may cause harm, threats, harassment, or reprisals to the donor. The proposed subdivision sets an April 1 deadline for reporting due on August 1 because the requesting entity is entitled to appeal the Board's determination in the Supreme Court of the State of New York pursuant to Article 78 of the Civil Practice Law, and because the Board is required to "maintain and regularly update a list on its website of all organizations that reported, and all donor information disclosed" pursuant to Administrative Code § 3-902. See Administrative Code § 3-902(b).*

- (2) Whether or not a reporting entity has submitted a request pursuant to this subdivision, the Board may upon its own initiative grant privacy as to any information submitted by an organization affiliated with an elected official, upon a finding by the Board that the release of such information would constitute a risk to the safety or security of any person.

Commentary: *This proposed subdivision would give the Board the authority to grant privacy as to any information that would constitute a risk to the safety and security of any person. This proposed rule is modeled after the Board's authority to take action in response to*

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similar threats to safety and security in the context of a public servant's financial disclosure report. See Administrative Code § 12-110(e)(1)(e).

Board Rules § 3-05. Record Retention.

- (a) *Records to be Kept.* An organization affiliated with an elected official shall retain all documents that enable the Board to verify the accuracy of the reporting required pursuant to Administrative Code § 3-902. Organizations shall maintain clear and accurate records sufficient to demonstrate compliance with Administrative Code §§ 3-901 to 3-907.

Commentary: *This proposed rule allows the Board to exercise its authority to enforce Local Law 181 of 2016 by implementing a record retention policy that will allow the Board to ensure the accuracy of statements made pursuant to the reporting requirement of Administrative Code § 3-902(a). While Administrative Code § 3-902(c) requires an organization to retain donor written submissions pursuant to § 3-903, Administrative Code §§ 3-901 to 3-907 contain no independent requirement that organizations retain any other records confirming the accuracy of the organization's annual reporting requirement. While the Board could require every organization affiliated with an elected official to submit all supporting documentation at the time the organization must submit its annual reporting, the Board believes that such a requirement would be unduly burdensome on both the organizations and the Board. Instead, the Board proposes a retention policy to allow the Board to verify compliance with Administrative Code §§ 3-901 to 3-907. It is modeled after New York City Campaign Finance Board Rule 4-01, which requires a candidate for office to maintain records that enable the Campaign Finance Board to verify the accuracy of disclosure statements and compliance with applicable law.*

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- (b) *Retention Period.* An organization affiliated with an elected official shall retain all records and documents required to be kept pursuant to this rule for at least 6 years after filing the report pursuant to Administrative Code § 3-902 to which the records or documents relate.

Commentary: *Pursuant to Board Rules § 1-10, the Board retains a public servant's financial disclosure report for 6 years. See also Administrative Code § 12-110(f). In addition, New York City Campaign Finance Rule 4-03(a) requires a candidate for political office to retain financial records relating to his or her campaign for 6 years. This proposed subdivision would apply a similar 6-year retention period to records retained pursuant to this proposed rule.*

- (c) *Custodian of Records.* An organization affiliated with an elected official shall designate a custodian of the organization's records or documents that substantiate the reporting required pursuant to Administrative Code § 3-902 and shall submit, at the time of each reporting pursuant to Administrative Code § 3-902, the name, address, e-mail address, and telephone number of the custodian of the organization's records. If an organization is no longer subject to the annual reporting requirement pursuant to Administrative Code § 3-902, the organization must, for 6 years after the date of its last filing required by Administrative Code § 3-902, notify the Board, in writing, of any change of custodian, or of the custodian's address, e-mail address, or telephone number, no later than 30 days after such change.

Commentary: *This proposed subdivision requires an organization to maintain with the Board the name and contact information of its custodian of records. Because the proposed*

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retention period for records required to be kept pursuant to this proposed rule is 6 years after the date that the organization filed the applicable report, see proposed Board Rules § 3-04(b), this proposed rule would require an organization no longer subject to the annual reporting requirement to update with the Board the name and contact information of its custodian for the duration of the retention period. New York City Campaign Finance Board Rule 4-03(b) contains a similar requirement that a political campaign must notify the Campaign Finance Board of a change in the custodian of records or of the custodian's contact information for the duration of the retention period.