

New York City Conflicts of Interest Board

Notice of Public Hearing and Opportunity to Comment on Proposed Rule Regarding Work for Not-For-Profit Entities

What are we proposing? The Conflicts of Interest Board intends to amend its rules by creating a procedure whereby agency heads may designate public servants to perform work on behalf of not-for-profit organizations and, with the approval of the Conflicts of Interest Board, participate in such organizations' business dealings with the City.

When and where is the Hearing? The Conflicts of Interest Board will hold a public hearing on the proposed rule. The public hearing will take place at 10:30 a.m. on January 18, 2019. The hearing will be at Spector Hall at 22 Reade Street, New York, New York 10007.

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

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

- **Website.** You can submit comments to the Conflicts of Interest Board through the NYC rules website at <http://rules.cityofnewyork.us>.
- **Email.** You can email comments to Chad H. Gholizadeh at Rules@COIB.nyc.gov.
- **Mail.** You can mail comments to Chad H. Gholizadeh, Assistant Counsel, Conflicts of Interest Board, 2 Lafayette Street, Suite #1010, New York, New York 10007.
- **Fax.** You can fax comments to the Conflicts of Interest Board at (212) 437-0705.
- **By Speaking at the Hearing.** Anyone who wants to comment on the proposed rule at the public hearing must sign up to speak. You can sign up before the hearing by calling (212) 437-0730. You can also sign up in the hearing room before the hearing begins on January 18, 2019. You can speak for up to three minutes.

Is there a deadline to submit comments? Yes, you must submit written comments by January 17, 2019.

Do you need assistance to participate in the hearing? You must tell the Conflicts of Interest Board if you need a reasonable accommodation of a disability at the hearing. You must tell us if you need a sign language interpreter. You can tell us by mail at the address given above. You may also tell us by telephone at (212) 437-0723. You must tell us by January 14, 2019.

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

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

Where can I find the Conflicts of Interest Board’s rules? The Conflicts of Interest Board’s rules are in Title 53 of the Rules of the City of New York.

What rules govern the rulemaking process? The Conflicts of Interest Board must meet the requirements of Section 1043 of the City Charter when creating or changing rules. This notice is made according to the requirements of Section 1043 of the City Charter.

STATEMENT OF BASIS AND PURPOSE

New York City Charter § 2604(b)(2) provides that “[n]o public servant shall engage in any business, transaction, or private employment, or have any financial or other private interest, direct or indirect, which is in conflict with the proper discharge of his or her official duties.” The Charter Revision Commission, in commenting on this provision at the time it was under consideration, stated that it had

retained this “catch-all” prohibition in recognition of the fact that the specific prohibitions set forth in [Chapter 68] cannot address all conflict of interest situations which may arise in the future and that the [Conflicts of Interest] [B]oard must retain the flexibility to handle new situations as they arise.

Volume II, Report of the New York City Charter Revision Commission, December 1986 – November 1988, at 175.

In 1998, after numerous requests for advice and enforcement actions, the Board promulgated rules implementing Charter § 2604(b)(2), set forth in Board Rules § 1-13 (“Conduct Prohibited by City Charter § 2604(b)(2)”), identifying what sorts of activities would present a conflict with the proper discharge of a public servant’s official duties. In its rules, the Board prohibits a public servant from “pursu[ing] personal and private activities during times when the public servant is required to perform services for the City” and from “us[ing] City letterhead,

personnel, equipment, resources, or supplies for any non-City purpose.” Board Rules §§ 1-13(a) and (b). These rules prohibit any use of City time and City resources on activities for a public servant’s private interests.

The Board’s Rules currently permit City employees to engage in personal and private activities using City time and City resources, but not letterhead, upon a written application by the agency head if the Board determines that the activity furthers the purposes and interests of the City. See Board Rules § 1-13(c). This provision exists because in some situations a public servant’s private activities provide an incidental benefit to the City. See Notice of Adoption of Rule Identifying Certain Conduct Prohibited by Charter § 2604(b)(2), Statement of Basis and Purpose of Rule at 3; *see also* Advisory Opinion No. 2001-3 at 8-9 (noting “skills training and professional development, public esteem for the legal profession, attorney job satisfaction, and generally a more efficient use of legal resources” as benefits of *pro bono* work by government attorneys, an example of such outside activity).

In the time since the Board promulgated Board Rules § 1-13, many public servants have requested advice about holding positions with firms or engaging in activities which, while not personal and private activities as described above, are also not strictly speaking City work. For example, a public servant may be asked to sit on the board of a not-for-profit which promotes an issue relevant to the public servant’s City work but in the course of that board service take on other responsibilities on behalf of the not-for-profit. Or a public servant could be asked by her supervisor to accept offers to sit on a professional association committee to advocate for adoption of policies which the public servant’s City agency believes are beneficial. Another example is the public servant who may be asked to provide analysis and support to a not-for-profit as part of that not-for-profit’s advocacy on issues related to the City’s policy goals. In

each of these situations, an agency has determined that the activity is in the City's interest and is also part of the public servant's City job.

However, a public servant's use of City time and City resources to work on behalf of the not-for-profit would be prohibited by Board Rules §§ 1-13(a) and 1-13(b), which forbid public servants from using City time or City resources for the work of these non-City entities. Under current rules, the mechanism made available by §1-13(c) would not apply because the proposed involvement in a not-for-profit's activities are not the "personal and private" activities of the public servant, but rather the work of the public servant's City agency.

These inquiries have arisen with more frequency because, in recent years, City agencies have increasingly made use of and relied upon not-for-profit entities to implement policies and projects that serve the City and its residents. Public servants often serve as staff or board members of these not-for-profit entities or provide other kinds of technical, fundraising, or logistical services to the not-for-profits. In the course of this work, public servants' use of City time and their City titles, staff, and/or resources, as well as some of their involvement with the City business of these not-for-profits, implicate several provisions of Chapter 68.

Many of these not-for-profits have business dealings with the City, as defined in Charter § 2601(8) (including "any transaction with the city involving the sale, purchase, rental, disposition or exchange of any goods, services, or property, any license, permit, grant or benefit, and any performance of or litigation with respect to any of the foregoing, but shall not include any transaction involving a public servant's residence or any ministerial matter"). Examples of such business dealings include, but are not limited to, the following scenarios: contracting with the City to provide services related to a City program; selling training and educational materials to City agencies for use by public servants; applying for and receiving funds from City agencies;

applying for permits from City agencies; and leasing space from the City. Some of the public servants working with these entities might have duties involving such business dealings, and a mechanism should be available to address these situations.

This proposed rule amendment, a new subdivision (e) of § 1-13, would provide a means for a public servant, at the direction of his or her agency head, to use City time and City resources in support of a not-for-profit entity that, among its other purposes, serves a City purpose as part of his or her City agency responsibilities.

First, where a public servant will not be involved in the not-for-profit's business dealings with the City, if any, an agency head may designate, in writing, a public servant to do such work and must publicly disclose such written designation to the Board. The proposal provides a limited exception, initially articulated in Advisory Opinion 2009-2, permitting City Council Members to sponsor and vote on discretionary funding for not-for-profits when their involvement with those not-for-profits is part of their official duties. See Advisory Opinion No. 2009-2 at 10-12; see also Advisory Opinion No. 1999-1 at 4 and Advisory Opinion No. 1992-22 at 2 (advising that elected officials do not need a waiver to serve on a not-for-profit board where such board service is part of the elected official's official duties but are still required to disclose pursuant to Charter § 2604(b)(1)(a)).

Second, where a public servant wishes to be involved in the not-for-profit's business dealings with the City, a public servant's agency head must submit a request for Board approval for that public servant's involvement, in a manner similar to the waiver process of Charter § 2604(e). Such Board approval, like a waiver, would be a public document. These public Board documents would be similar to the ones issued pursuant to Board Rules § 1-13(c), whereby the Board approves, upon application by the agency head, an individual public servant's use of City

time and City resources for a specific personal and private activity that furthers the purposes and interests of the City.

In either a designation pursuant to proposed Board Rules § 1-13(e)(1) or an application for Board approval pursuant to proposed Board Rules § 1-13(e)(2), an agency head would be required to state that there is a demonstrated nexus between the proposed work on behalf of a not-for-profit, the public servant's City job, and the mission of the public servant's agency; and that such work furthers the agency's mission and is not undertaken primarily for the benefit or interests of the not-for-profit. Proposed Board Rules § 1-13(e)(3) would define who may submit designations and requests in a manner similar to the waiver provisions of Charter § 2604(e), with the exception of elected officials who, in light of their unique roles and positions in City government, may designate or approve themselves and members of their staff. See Advisory Opinion No. 1999-1 (advising that elected officials may designate in writing members of their staff to serve on a not-for-profit board where such board service is part of the elected official's and the staff member's official duties). Because the definition of "elected official" in Charter § 2601(10) does not include district attorneys, proposed Board Rules § 1-13(e)(3) specifically identifies district attorneys as having the same role and responsibility under this rule as other City elected officials. For the purposes of this rule, members of an elected official's staff would include the staff employed in the District Office of a City Council Member.

Text of the Proposed Rule

New material is underlined.

Section 1. Subdivision (e) of Section 1-13 of Chapter 1 of Title 53 of the Rules of the City of New York is re-lettered as subdivision (f) and a new subdivision (e) is added to read as follows:

§ 1-13. Conduct Prohibited by City Charter § 2604(b)(2).

* * *

(e) (1) An agency head may designate a public servant to perform work on behalf of a not-for-profit corporation, association, or other such entity that operates on a not-for-profit basis, including serving as a board member or other position with fiduciary responsibilities provided that:

(a) there is a demonstrated nexus between the proposed activity, the public servant's City job, and the mission of the public servant's agency; and such work furthers the agency's mission and is not undertaken primarily for the benefit or interests of the not-for-profit;

(b) the designated public servant takes no part in the entity's business dealings with the City at the entity or at his or her agency, except that Council Members may sponsor and vote on discretionary funding for the entity; and

(c) within 30 days the written designation is disclosed to the Conflicts of Interest Board and will be posted on the Board's website.

(2) A public servant designated in accordance with paragraph (1) of this subdivision may take part in such entity's business dealings with the City at the entity and/or at his or her agency if, after written approval of the agency head, the Board determines that there is a demonstrated nexus between the proposed participation, the public servant's City job, and the mission of the public servant's agency; and that such participation furthers the agency's mission and is not undertaken primarily for the benefit or interests of the not-for-profit entity.

(3) The designation made pursuant to paragraph (1) and approval made pursuant to paragraph (2) of this subdivision must be by the head of the agency served by the public servant, or by a deputy mayor if the public servant is an agency head. A public servant who is an elected official, including a district attorney, is the agency head for the public servants employed by the official's agency or office. A public servant who is an elected official, including a district attorney, may provide the designation pursuant to paragraph (1) and the agency head approval pursuant to paragraph (2) for him or herself.

**NEW YORK CITY LAW DEPARTMENT
DIVISION OF LEGAL COUNSEL
100 CHURCH STREET
NEW YORK, NY 10007
212-356-4028**

**CERTIFICATION PURSUANT TO
CHARTER §1043(d)**

RULE TITLE: Work Performed for Non-Profit Organizations

REFERENCE NUMBER: 2018 RG 125

RULEMAKING AGENCY: Conflicts of Interest Board

I certify that this office has reviewed the above-referenced proposed rule as required by section 1043(d) of the New York City Charter, and that the above-referenced proposed rule:

- (i) is drafted so as to accomplish the purpose of the authorizing provisions of law;
- (ii) is not in conflict with other applicable rules;
- (iii) to the extent practicable and appropriate, is narrowly drawn to achieve its stated purpose; and
- (iv) to the extent practicable and appropriate, contains a statement of basis and purpose that provides a clear explanation of the rule and the requirements imposed by the rule.

/s/ STEVEN GOULDEN
Acting Corporation Counsel

Date: November 29, 2018

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

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

RULE TITLE: Work Performed for Non-Profit Organizations

REFERENCE NUMBER: COIB-5

RULEMAKING AGENCY: Conflicts of Interest Board

I certify that this office has analyzed the proposed rule referenced above as required by Section 1043(d) of the New York City Charter, and that the proposed rule referenced above:

- (i) Is understandable and written in plain language for the discrete regulated community or communities;
- (ii) Minimizes compliance costs for the discrete regulated community or communities consistent with achieving the stated purpose of the rule; and
- (iii) Does not provide a cure period because it does not establish a violation, modification of a violation, or modification of the penalties associated with a violation.

/s/ James Archer
Mayor's Office of Operations

December 3, 2018
Date