

## New York City Conflicts of Interest Board

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

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

**When and where is the Hearing?** The Conflicts of Interest Board will hold a public hearing on the proposed rule. The public hearing will take place at 10:00 a.m. on July 25, 2019. The hearing will be at Spector Hall at 22 Reade Street, New York, New York 10007.

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

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

- **Website.** You can submit comments to the Conflicts of Interest Board through the NYC rules website at <http://rules.cityofnewyork.us>.
- **Email.** You can email comments to Katherine Miller, Assistant Counsel, at [Rules@COIB.nyc.gov](mailto:Rules@COIB.nyc.gov)
- **Mail.** You can mail comments to Katherine Miller, Assistant Counsel, Conflicts of Interest Board, 2 Lafayette Street, Suite #1010, New York, New York 10007.
- **Fax.** You can fax comments to the Conflicts of Interest Board at (212) 437-0705.
- **By Speaking at the Hearing.** Anyone who wants to comment on the proposed rule at the public hearing must sign up to speak. You can sign up before the hearing by calling (212) 437-0730. You can also sign up in the hearing room before the hearing begins on July 25, 2019. You can speak for up to three minutes.

**Is there a deadline to submit comments?** Yes, you must submit written comments by July 25, 2019.

**Do you need assistance to participate in the hearing?** You must tell the Conflicts of Interest Board if you need a reasonable accommodation of a disability at the hearing. You must tell us if you need a sign language interpreter. You can tell us by mail at the address given above. You may also tell us by telephone at (212) 437-0730. You must tell us by July 19, 2019.

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

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

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

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

## STATEMENT OF BASIS AND PURPOSE

### Overview

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

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

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

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

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

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

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

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

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

#### Proposed § 2-02 Informal Proceedings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Proposed § 2-03 Formal Proceedings

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

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

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

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

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

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

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

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

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

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

### **Text of Proposed Board Rules**

New material is underlined.

[Deleted material is in brackets.]

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

## Chapter 2: Procedural Rules for Enforcement Actions

### § 2-01 Applicability and Definitions.

#### (a) Applicability.

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

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

#### (b) Definitions.

“Board” means the Conflicts of Interest Board.

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

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

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

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

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

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

**§ 2-02 Informal Proceedings.**

*(a) Notice of Initial Determination of Probable Cause.*

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

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

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

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

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

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

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

(c) Referral to agency.

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

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

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

*(d) Representation by an attorney or other person.*

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

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

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

(e) Stay of an enforcement action.

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

(f) Settlement.

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

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

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

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

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

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

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

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

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

## **§ 2-03 Formal Proceedings.**

### **(a) Designation of OATH.**

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

### **(b) Commencement of formal proceedings.**

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

### **(c) Ex Parte communications with the Board.**

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

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

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

(d) Answer.

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

(e) Settlement.

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

(f) Hearing.

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

(2) The enforcement attorney will make an opening statement first, after which the respondent may make an opening statement.

(3) The enforcement attorney will initiate the presentation of evidence. After the enforcement attorney has completed the presentation of the Board's evidence, the respondent may present evidence. The enforcement attorney may present rebuttal evidence.

(4) The enforcement attorney will make a closing statement first, after which the respondent may make a closing statement.

(g) OATH report.

After a hearing has been conducted, OATH will issue a confidential report of its recommended findings of fact and conclusions of law and its recommended disposition of the enforcement action.

OATH will send the report, along with the original transcript of the hearing and all documents introduced into the record, to the Board for review. OATH will send a copy of the report to the enforcement attorney and the respondent or respondent's representative, if applicable.

(h) Comment on OATH report.

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

(i) Final review by the Board.

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

(j) Board order finding a violation.

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

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

(k) Board dismissal.

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

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

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

**RULE TITLE:** Procedural Rules for Enforcement Actions

**REFERENCE NUMBER:** 2019 RG 014

**RULEMAKING AGENCY:** Conflicts of Interest Board

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

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

/s/ STEVEN GOULDEN  
Acting Corporation Counsel

Date: May 22, 2019

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

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

**RULE TITLE:** Procedural Rules for Enforcement Actions

**REFERENCE NUMBER:** COIB-8

**RULEMAKING AGENCY:** Conflicts of Interest Board

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

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

/s/ Francisco X. Navarro  
Mayor's Office of Operations

May 24, 2019  
Date