

## **New York City Conflicts of Interest Board**

### **Notice of Adoption of Final Rules**

NOTICE IS HEREBY GIVEN PURSUANT TO THE AUTHORITY VESTED IN THE NEW YORK CITY CONFLICTS OF INTEREST BOARD by Sections 1043, 2603(a), and 2603(c)(4) of the City Charter that the Conflicts of Interest Board has adopted Board Rules amending its rules related to the post-employment restrictions.

The proposed Rules were published in the City Record on August 26, 2020, and a public hearing was held on September 28, 2020. No comments were received, either prior to or during the hearing. The Conflicts of Interest Board now adopts the following Rules.

### **STATEMENT OF BASIS AND PURPOSE**

The post-employment restrictions of Chapter 68 of the City Charter, contained in Charter § 2604(d), seek to balance two competing City interests:

- (1) the need to recruit to public service talented individuals who may wish to return to or pursue private sector employment after their City service, and
- (2) the need to prevent public servants from trading on connections made in City government service or using confidential City information for the benefit of themselves or future employers.

See Volume I, Report of the New York City Charter Revision Commission, December 1986 – November 1988, at 28-29; see also Advisory Opinions (“A.O.”) Nos. 1993-11 at 6, 1993-12 at 4, 1994-15 at 11-12, and 1996-1 at 7.

Since it was established in 1989, the Board has issued 31 advisory opinions, totaling 210 pages, providing guidance on the application of the post-employment restrictions set forth in Charter § 2604(d) and on how the Board has considered requests for waivers of those restrictions. Because of the limited scope and duration of the post-employment restrictions, requests for waivers of Charter § 2604(d) are never merely technical, and the Board has engaged in a detailed review of the competing interests at issue in each request. With the benefit of almost 30 years of experience in evaluating requests for post-employment waivers, and in fulfillment of the mandate of Charter § 2603(c)(4) to determine which of its advisory opinions “have interpretative value in construing provisions of this chapter,” the Board codifies:

- Definitions of terms within Charter § 2604(d), such as “agency served” and “termination of service.”
- A new “totality of the circumstances” standard with a non-exclusive list of four factors, drawn from advisory opinions, that the Board will consider when evaluating requests for waivers of the post-employment restrictions.

- The standard, also drawn from advisory opinions, for evaluating a unique type of post-employment work: consulting for one’s former City agency, known as “consulting back.”

The rule addresses the following 22 advisory opinions:

A.O. No. 1991-8, A.O. No. 1991-19, A.O. No. 1992-13, A.O. No. 1992-17, A.O. No. 1992-37, A.O. No. 1992-38, A.O. No. 1993-11, A.O. No. 1993-12, A.O. No. 1993-18, A.O. No. 1993-30, A.O. No. 1994-15, A.O. No. 1994-19, A.O. No. 1994-22, A.O. No. 1995-1, A.O. No. 1996-1, A.O. No. 1998-11, A.O. No. 2000-2, A.O. No. 2008-1, A.O. No. 2008-4, A.O. No. 2009-5, A.O. No. 2012-2, and A.O. No. 2019-1.

Certain post-employment issues considered by the Board are not the subject of this rulemaking, specifically the advisory opinions interpreting Charter § 2604(d)(6), which the Board reserves for the subject of possible future rulemaking. See A.O. No. 1993-13, A.O. No. 1994-7, A.O. No. 1994-21, A.O. No. 1997-1, and A.O. No. 1999-3. The Board is not adopting A.O. Nos. 1989-1, 1992-2, 1992-32, and 2007-1, which apply only to the public servants who requested those opinions.

## **1. Definitions**

### **a. Post-Employment Appearances**

Board Rules § 1-07(a)(1) codifies the Board’s long-standing interpretation that the prohibitions in Charter §§ 2604(d)(2), 2604(d)(3), and 2604(d)(4) against a former public servant appearing before or communicating with a former agency or branch of government served include appearances before or communications with representatives of that agency or branch serving on a City board or commission. For example, an employee of the New York City Department of Housing Preservation & Development (“HPD”) would be prohibited by Charter § 2604(d)(2) from appearing at a meeting of the board of the New York City Housing Development Corporation (“HDC”) within the former HPD employee’s first post-employment year if the HPD representative sitting on the HDC board is participating in that meeting. See A.O. No. 2008-1 (advising that when a public servant simultaneously holds positions at multiple City agencies the post-employment appearance restriction of Charter § 2604(d)(2) applies to each position); see also COIB v. Sirefman, COIB Case No. 2007-847 (2009) (fining the former Interim President of the New York City Economic Development Corporation (“EDC”) \$1,500 for appearing before the Hudson Yards Development Corporation (“HYDC”) within one year of his resignation from EDC because the current EDC President was present at a meeting attended by the former Interim President in the EDC President’s capacity as an *ex-officio* Member and Director of HYDC). By contrast, a former HPD employee would not be prohibited from communicating with other employees of HDC, nor would the former employee be prohibited from communicating with or appearing before meetings of the HDC board from which the HPD representative was absent or recused.

Board Rules § 1-07(a)(2) codifies the Board’s interpretation that the appearance and communication restrictions of Charter § 2604(d) exclude appearances and communications related to non-City matters. In particular, the Board has advised public servants that the

following communications are not prohibited by Charter § 2604(d): (1) social communications; (2) soliciting a public servant's personal legal business or other types of personal services; and (3) seeking an endorsement for a run for political office. See A.O. No. 2009-5 (advising a former public servant that the post-employment appearance restriction did not prohibit communication with a current public servant in their private capacity, such as reaching out to perform personal legal work, asking them to leave City employment to join the former public servant's new firm, or soliciting a political endorsement).

#### **b. Date of Termination of City Service**

To advise a public servant about the applicability of Charter § 2604(d), the Board must determine when the public servant's City service ended. In Board Rules § 1-07(b)(1), the Board incorporates the method of calculating the date of a public servant's termination from City service set forth in A.O. Nos. 1998-11 and 2019-1: that is, the later of either the last day a former public servant performed official City duties or the last day the public servant received benefits conditioned upon current City employment after resigning, retiring, or being terminated. The one-year appearance prohibition of Charter § 2604(d)(2) will run from that date.

In Board Rules § 1-07(b)(2), the Board retains the substance of the former version of Board Rules § 1-07 and codifies A.O. No. 2008-1 for public servants who serve multiple City agencies. See also A.O. No. 1993-30 (providing advice on the tolling dates of the one-year appearance restriction to a public servant who served two agencies in succession before leaving City service). The rule clarifies that a former public servant who has served more than one City agency, concurrently or sequentially, is prohibited from appearing before each such agency for one year after the termination of service, as determined by Board Rules § 1-07(b)(1), with each such agency.

## **2. Otherwise Prohibited Conduct**

#### **a. Waivers of the Post-Employment Restrictions**

In contrast to the broad prohibitions against full-time public servants having ownership interests in or positions at firms that do business with any City agency, for the vast majority of public servants, the post-employment appearance restrictions apply only to a former public servant's communications with their former employing City agency or branch of government and only for one year after leaving City service. Similarly, the lifetime post-employment particular matter restriction applies only to a narrow set of matters (as defined in Charter § 2601(17)) on which a former public servant worked personally and substantially while in City service. See, e.g., A.O. No. 1992-38 (advising that a public servant was not prohibited from working on a project where her involvement had been personal but not substantial).

However, because public servants requesting waivers of the post-employment restrictions are seeking to engage in conduct in which the relationships developed in their former City position may influence decision-making by their former City agency, or that may put them in a position to utilize their superior familiarity with, and ability to navigate, the subtle culture of their former agency to achieve preferential treatment for their private employer, or involve the

exact particular matters on which the former public servant personally and substantially worked while in City service, the Board has analyzed requests for waivers of the post-employment restrictions differently from waivers of other provisions of Chapter 68.

In evaluating the many requests for waivers it has received, the Board has sought to balance adhering to the post-employment restrictions of the Charter with the asserted need for a particular former public servant to engage in otherwise prohibited conduct to further an identified City interest. In A.O. No. 1991-8, the Board announced that it would issue waivers of Chapter 68's post-employment restrictions "sparingly, and only in exigent cases." A.O. No. 1991-8 at 2-3; see also A.O. No. 1992-13 (declining to issue a waiver to a public servant seeking to communicate with their former branch of government on behalf of a private employer).

The Board has traditionally considered four factors when evaluating requests for post-employment waivers:

- (1) the relationship between the City and the public servant's private employer;
- (2) the benefits to the City (as opposed to the public servant) if the waiver were granted;
- (3) the likelihood of harm to other organizations similar to, or in competition with, a public servant's prospective employer if the waiver were granted; and
- (4) the extent to which the public servant has unique skills or experience suited to the particular position that the prospective employer would be hard-pressed to find in another person (see, e.g., A.O. No. 2012-2).

In applying this long-utilized test, the Board has determined that, when the former public servant's private employer was a not-for-profit organization working in a public-private partnership with the City in which the private employer and the City share an identity of interest, all four factors "need not be satisfied." A.O. No. 2000-2 at 4; see A.O. No. 2008-4. The Board has further explained that, for private employers that devote substantial private resources to support the work of a City agency but which do not meet the standard of a public-private partnership, requests for waivers will "be analyzed in light of [the private employer's] hybrid status." A.O. No. 2008-4 at 10.

Since 1991, the Board has grappled with articulating and applying a standard to requests for waivers of the post-employment restrictions that would fulfill the objectives of the post-employment restrictions while also addressing the needs of City agencies and the City's changing relationship with not-for-profit partners. Over the course of these years, it has become clear that the Board would benefit from the consideration of a more complete set of circumstances. Board Rules §1-07(c)(1) codifies a new "totality of the circumstances" standard for determining whether a waiver of the post-employment restrictions would conflict with the purposes and interests of the City. As part of how the Board would evaluate the totality of the circumstances, Board Rules §1-07(c)(1) includes a non-exhaustive list of four factors drawn from the Board's past deliberations on post-employment waivers.

Board Rule § 1-07(c)(1)(i): When a former public servant's work for a private employer involves furthering an interest identical to that of the City, there are diminished concerns about such former public servant using their special access or knowledge to the detriment of the City's interests. Therefore, the Board has historically been more likely to grant requests for waivers for former public servants who work for entities that the City controls or effectively controls. See A.O. 2008-4 (observing that the Board would look favorably upon requests to work for City-affiliated not-for-profits when those entities were created by City agencies and had a governing structure that involved public officials as officers or board members). Additionally, in the past the Board has granted waivers in situations where the former public servant's private employer operates as a public-private partnership with the City and devotes substantial private resources to support the work of a City agency. See A.O. No. 2008-4 (stating that, "[w]hen the City and [a private employer] share an 'identity of interest,' the City benefits from encouraging former City employees to effectively remain in public service" by working for that private employer); A.O. No. 1994-22 (granting a waiver for a public servant to take a position at a bio-medical facility which operated as a joint venture between the City, the State, and a university).

Board Rule § 1-07(c)(1)(ii): When a former public servant is uniquely suited to perform work that would benefit the City, rather than their private employer, the proposed post-employment activities do not conflict with the purposes and interest of the City. See A.O. No. 2012-2 (stating that, in evaluating a request for a waiver of the post-employment restrictions, "the Board looks for a demonstration of the benefit *to the City*, not to the new employer") (emphasis in original). The potential benefit to the City has been articulated in two ways: either by virtue of the former public servant's unique technical or professional expertise or because at a small not-for-profit, there is no other employee able to do the prohibited work. See A.O. No. 1992-17 (granting a public servant a waiver of the post-employment restrictions to work for an entity when his expertise would help remedy contractual disputes between the entity and the agency); A.O. No. 1994-19 (granting a waiver of Charter § 2604(d)(3) when a public servant's proposed communications on behalf of a not-for-profit entity would primarily benefit the City).

Board Rule § 1-07(c)(1)(iii): Because public servants who have worked for the City for brief periods of time are less likely than those who served for extended periods of time in City government to have developed the type of connections that could afford them undue influence or unfair access, the Board has issued post-employment waivers for these public servants more readily. See COIB Case No. 2019-463 (40 days); COIB Case No. 2017-790 (36 days); COIB Case No. 2017-214 (38 days); COIB Case No. 2015-646 (40 days); COIB Case No. 2013-381 (granting a waiver for a former paid summer intern). Additionally, public servants whose City service was part-time on a consultative body have been granted post-employment waivers more frequently in light of the limited role they played in City government.

Board Rule § 1-07(c)(1)(iv): A former public servant communicating with their former agency on behalf of a private employer shortly after departing may pose a risk of harm to firms similar to or in competition with that private employer, given the former public servant's familiarity with, and ability to navigate, the processes of their former agency. To mitigate this risk, the Board will continue to disfavor requests in which the former public servant proposes to communicate with units or divisions at the former agency with which he or she worked regularly. See A.O. No. 1993-8 (stating that one of the purposes of the post-employment restrictions was to

prevent the exertion of special influence on government decision-making by, among other things, preventing contact with former City colleagues on behalf of a new employer); A.O. No. 1994-15 (granting a waiver of the one-year appearance restriction for a public servant working for a unique not-for-profit created by New York State to communicate with a unit of his former City agency other than the one for which he worked). Additionally, the Board will continue to disfavor requests for waivers for former public servants who wish to communicate with their former agencies to seek new business for their private employers in the forms of licenses, permits, grants, or contracts. Compare A.O. No. 1992-17 (granting a waiver of the post-employment restrictions to a public servant when her work at a private employer “would help remedy pending contractual disputes between the entity and the agency”) with A.O. No. 1993-18 (declining to grant a waiver to a public servant whose work at his private employer would focus, in part, on encouraging the participation of his private employer’s clients in programs run by his former City agency); see also A.O. No. 1991-19 (prohibiting a public servant making an otherwise ministerial FOIL request from bypassing normal procedures to contact individuals directly).

Additionally, in Board Rules § 1-07(c)(2), the Board establishes two procedural requirements for waivers of the post-employment restrictions. First, the Board will decline to issue waivers when the request is made after undue delay. In considering such requests, the Board’s decision-making is hindered by a lack of time to evaluate the specific circumstances of the request as well as the complications that, in the Board’s experience, often accompany such requests, most commonly the former public servant having already accepted (or started) a job that requires otherwise prohibited communications. The Board has emphasized this factor to ensure that self-created exigencies do not take precedence over other relevant factors. See A.O. No. 2012-2 (advising that request for waivers of the post-employment restrictions should be submitted in advance of departure from City service); A.O. No. 1992-37 (noting with disapproval that a former public servant did not request a waiver prior to having accepted the position with a private employer).

Second, the Board will decline to issue waivers when a former public servant has, in the course of soliciting employment, violated Charter § 2604(d)(1), which requires recusal from any particular matters involving a private employer while soliciting or negotiating for a position with that employer. See A.O. No. 1992-37 (observing that a former public servant’s solicitation and negotiation for a position with a private employer that had business dealings with her own agency raised the possibility that a violation of Charter Section 2604(d)(1) had occurred).

### **3. Consulting for a Former City Agency**

As part of its experience applying the post-employment restrictions, the Board has also considered how those restrictions impact the City’s ability to retain the expertise held by retiring and departing City employees. The Board’s approach to this issue has been informed by Charter § 2604(d)(6), the so-called “government-to-government” exception, which provides that the post-employment restrictions “shall not apply to positions with or representation on behalf of any local, state or federal agency.” Historically, the Board has determined that a City agency’s consulting agreement with a former employee falls within the government-to-government exception when: (1) the former agency has a pressing need for the former employee’s services,

(2) the former agency contracts directly with the former employee, not through a firm employing the former public servant, and (3) the contracting compensation is comparable to that of the employee's salary at the time he or she left the agency. See A.O. Nos. 1993-12; 1995-1. Board Rules § 1-07(d)(1) provides a new set of five more specific and detailed conditions which, if met, would permit a former public servant to be retained directly, rather than through an employer, as a consultant by the City agency for which he or she worked with the written approval of the agency head. Such written approval must then be provided to the Board, which will post that information on its website.

The Board has also reviewed matters where, for reasons of administrative convenience, a City agency seeks to employ a former employee as a consultant through an intermediary entity, rather than directly as a consultant. This often arises when a City agency seeks to retain a public servant as a consultant through a temporary staffing agency with which the agency already has a staffing contract. In this case, because the former public servant would be an employee of the temporary staffing agency or other intermediary entity, the "government-to-government" exception of Charter § 2604(d)(6) would not apply. However, because in many circumstances the consulting arrangement is motivated by the same City purpose that motivates direct consulting arrangements, the Board has often issued waivers to public servants whose former City agencies seek to employ them in this manner when it has determined there is no likelihood that the intermediary entity may reap disproportionate benefits from the City agency's need to retain its former employee. See A.O. No. 1995-1 at 6. In Board Rules § 1-07(d)(2) the Board articulates a standard that such waivers must meet, incorporating the requirements of Board Rules § 1-07(d)(1), but also requiring that the intermediary entity is selected by the City rather than by the public servant.

New material is underlined.

Section 1. Section 1-07 of Chapter 1 of Title 53 of the Rules of the City of New York, relating to post-employment limitations on the activities of former public servants, is REPEALED and a new Section 1-07 is added to read as follows:

#### §1-07 Post-Employment

##### (a) Post-Employment Appearances

(1) For the purposes of the restrictions set forth in Charter § 2604(d) on appearances by a former public servant before their former City agency, or branch of City government, or the City, such prohibited appearances include compensated communications with representatives of that former agency or branch of City government sitting as members of City boards, commissions, or other governmental entities.

(2) The restrictions set forth in Charter § 2604(d) on appearances by a former public servant do not include appearances related to non-City matters.

##### (b) Date of Termination of City Service

(1) For purposes of Charter § 2604(d)(2), the date of termination of a former public servant's City service is the later of the last day a former public servant performed official City duties or the last day they received benefits conditioned upon current City employment.

(2) A former public servant who has served more than one City agency within one year prior to the termination of such public servant's service with the City may not appear before each such City agency for a period of one year after the termination of service from each such agency.

(c) Waivers of the Post-Employment Restrictions

(1) In determining whether to issue a waiver pursuant to Charter § 2604(e) of the post-employment restrictions of Charter § 2604(d) the Board will consider the totality of the circumstances, including, but not limited to:

(i) whether the City shares an identity of interest with, or controls or effectively controls, the former public servant's private employer;

(ii) whether the former public servant is uniquely suited to perform work that would benefit the City because:

1. the private employer has no other employees able to engage in the proposed appearances or work; or

2. the former public servant has rare or unique technical or professional expertise necessary to engage in the proposed appearances or work;

(iii) whether the former public servant is unlikely to exercise undue influence on government decision-making because they were a public servant for only a short period of time; and

(iv) whether the former public servant's proposed appearances or work do not pose a risk of harm to firms similar to, or in competition, with the former public servant's private employer.

(2) The Board will not grant requests for waivers of Charter § 2604(d):

(i) made after undue delay; or

(ii) for former public servants who were not fully and formally recused from all particular matters involving the private employer from the time of soliciting or negotiating for employment with the private employer through the termination of their City service.



(d) Consulting for a Former City Agency

(1) Pursuant to Charter § 2604(d)(6), with the written approval of the agency head, a former public servant may be directly retained by their former City agency as a consultant within one year of the termination of their City service, and may work on particular matters with which they were personally and substantially involved, provided that:

(i) the consulting arrangement is made for the purpose of continuing or completing work left unfinished by the former public servant at the time their City service terminated, or for training their replacement, or for filling a vacancy until a replacement can be hired;

(ii) the duration of the consulting arrangement is no longer than reasonably necessary;

(iii) the former public servant has technical, professional, or other subject-matter expertise or skills not otherwise available among the agency's employees;

(iv) the compensation is comparable to what the former public servant last earned at the agency; and

(v) within 30 days the written approval of the agency head is disclosed to the Conflicts of Interest Board, which approval will be posted on the Board's website.

(2) Where a proposed consulting arrangement between a City agency and a former public servant does not meet all of the requirements set forth in paragraph (1) of this subdivision and is therefore not covered by Charter § 2604(d)(6), a waiver may be sought for such a proposed arrangement pursuant to Board Rules § 1-07(c).

(3) Pursuant to Charter § 2604(e), a consulting arrangement between a former public servant and their former agency that meets the requirements of paragraph (1) of this subdivision but under which the former public servant is retained through a private firm for the administrative convenience of the City may be entered into if:

(i) the former public servant played no role in the recommendation or selection of the private firm in his or her work as a public servant; and

(ii) after receiving written approval of the head of the City agency, the Board determines that the proposed consulting arrangement would provide a benefit to the City distinct from the benefit to the former public servant or to the private firm.