

New York City Conflicts of Interest Board

Notice of Adoption

NOTICE IS HEREBY GIVEN PURSUANT TO AUTHORITY VESTED IN THE NEW YORK CITY CONFLICTS OF INTEREST BOARD by Sections 1043 and 2603 of the New York City Charter and Sections 3-228, 3-907, and 3-1106 of the New York City Administrative Code that the Conflicts of Interest Board has amended Chapter 2 of Title 53 of the Rules of the City of New York to update its procedural rules for enforcement actions.

The proposed Rules were published in the City Record on November 17, 2023, and a public hearing was held on December 20, 2023. After consideration of the written comment received, the Conflicts of Interest Board now adopts the following Rules.

Statement of Basis and Purpose

In 2019, the Conflicts of Interest Board (the “Board”) comprehensively revised Chapter 2 of the Rules of the Board, which governs the Board’s enforcement process, “both to reflect its current enforcement process and to improve, where needed, various aspects of that process.” Board Rules Chapter 2, Statement of Basis and Purpose (City Record, August 30, 2019). With four years of additional perspective on how Chapter 2 works in practice, the Board clarifies and updates these procedures.

1. Applicability of Chapter 2 to the Annual Disclosure Law

In its 2019 revisions to Chapter 2, the Board eliminated references to the Annual Disclosure Law, Administrative Code § 12-110. The Board subsequently codified in Board Rules § 4-07 procedures for assessing penalties against annual disclosure filers who submit late reports in violation of Administrative Code § 12-110(g)(1). However, for intentional violations of the Annual Disclosure Law, identified in Administrative Code § 12-110(g)(2), such as failure to include or misstatement of assets or liabilities, the Board has historically utilized the same process as it does for the enforcement of Chapter 68 violations, usually by adding alleged violations of the Annual Disclosure Law to a Chapter

68 violation. Accordingly, the Board reinserts a reference to Administrative Code § 12-110(g)(2) so that the procedures contained in Chapter 2 apply to enforcement of that provision in the Annual Disclosure Law. See Board Rules § 2-01(a)(5).

2. Order of Closing Statements

Prior to 2019, former Board Rules § 2-03(d)(3) provided that closing statements at a hearing “shall be made first by the [respondent].” The 2019 amendments to Board Rules Chapter 2 switched this order to provide that “[t]he enforcement attorney will make a closing statement first, after which the respondent may make a closing statement.” Board Rules § 2-03(f)(4). This amendment is inconsistent with standard trial practice. The Board reorders closing statements so that the respondent or respondent’s representative has the opportunity to give a closing statement first, followed by the enforcement attorney, with the ALJ able to modify this order on motion for good cause shown. See Board Rules § 2-03(f)(4). The amendment conforms the Board’s procedures to the standard trial practice of giving the party with the burden of proof the final word.

3. Page Limit for Written Statements

There is presently no page limit for a written closing statement submitted in lieu of an oral closing statement, a comment to the Administrative Law Judge’s (“ALJ’s”) Report and Recommendation, or a response to the other party’s comment. The Board adopts a limit of 30 double-spaced pages for written closing statements or comments to the ALJ’s Report and Recommendation and 15 double-spaced pages for a response to the other party’s comment on the Report and Recommendation, with the ALJ able to modify this length on motion for good cause shown. This rule mirrors the page limits contained in the

Federal Rules of Appellate Procedure. See Board Rules § 2-03(f)(4); Fed. R. App. P. 32(a)(7)(A).

4. Ex Parte Communications

Board Rules § 2-03(c) retains the Board's longstanding prohibition of *ex parte* communications by the enforcement attorney with the Board or counsel to the Board when the Board reviews the OATH Report and Recommendation and makes its final determination. The Board extends this prohibition to *ex parte* communications by the respondent or respondent's representative with the Board or counsel to the Board, communications that the Board had previously discouraged without prohibiting. See Board Rules § 2-03(c).

5. Garnishment of City Wages to Collect Penalty

The amendment to Board Rules § 2-03(j)(4) recognizes that, among the methods available to the Board for obtaining a penalty, the Board may seek garnishment of the wages of the respondent if the respondent is a current City employee. See Board Rules § 2-03(j)(4).

6. Clarifying Edits

Finally, the Board adopts two categories of clarifying edits to make Chapter 2 more user-friendly: organizational edits so that the order of the sections follows the chronology of a case and descriptive edits to assist respondents and their representatives in understanding the enforcement process.

Text of Adopted Rule

New material is underlined.

[Deleted material is bracketed.]

Chapter 2 of Title 53 of the Rules of the City of New York is amended to read as follows:

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); and

(5) § 12-110(g)(2) of the Administrative Code (the Annual Disclosure 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 officials, 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] person or firm alleged to have violated a law identified in subsection (a) of this section.

§ 2-02 [Informal Proceedings] Notices of Probable Cause and Pre-Hearing Procedures.

(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)] 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]before it files a petition at OATH.

(2) Upon oral or written request within [twenty (20)] 20 days from the date of service of the Notice, the respondent will be granted a [thirty- (30-) day] 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] 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]Sustaining probable cause.*

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

[2](ii) 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.

(2) If the Board sustains its initial determination of probable cause against a respondent who is not entitled to disciplinary rights as described in Charter § 2603(h)(2), the Board will file a Petition at OATH against the respondent pursuant to Board Rules § 2-03(b)(1).

(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]a law identified in Board Rules § 2-01(a); 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]a law identified in Board Rules § 2-01(a).
- (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]Enforcement Hearings and Post-Hearing Procedures.

(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 at OATH.*

(1) The Board will [commence formal proceedings at OATH by serving]serve 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]parte communications[with the Board].*

(1) After service of the [Notice of Petition and]Petition pursuant to Board Rules § 2-03(b)(1), the respondent, respondent's representative, or any [Board]enforcement 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] The respondent, respondent's representative, or 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]opposing party; 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. The OATH Rules govern the procedures for a Notice of Appearance, withdrawal, or substitution of the 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]Board 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 or respondent's representative 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 or respondent's representative may present evidence. The enforcement attorney may present rebuttal evidence.
- (4) The [enforcement attorney]respondent or respondent's representative will make a closing statement first, after which the [respondent may]enforcement attorney will make a closing statement. Written closing statements may not exceed 30 double-spaced pages. The order and length of the closing statements may be modified by the OATH ALJ on motion for good cause shown.

(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]admitted into [the record]evidence, 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)]20 days from the date of the OATH report, each party may submit a comment to the Board, which may not exceed 30 double-spaced pages, 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, which may not exceed 15 double-spaced pages, within [thirty (30)]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]only consider [new]evidence [submitted in a comment or in a response to a comment]admitted at trial.

(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]admitted 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]a law identified in Board Rules § 2-01(a). 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]a law identified in Board Rules § 2-01(a), 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 email or 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)]30 days of the date of service. If the respondent does not pay the full monetary penalty amount, the Board will [refer the matter]pursue all remedies, which may include garnishment of City wages or referral 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]laws identified in Board Rules § 2-01(a), 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).