ENFORCEMENT

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A. Introduction

Conflicts of interest between New York City employees' private interests and public duties, allowed to go unchecked, can impose significant costs on the City. Conflicts of interest can deprive the City of its resources, as office supplies, money, or staff time are diverted from their intended purposes to the personal benefit of a particular public servant. In an era of tight budgets, even the smallest loss of resources can result in a reduction in services provided to the citizens of the City. Nepotism in hiring, promotion, and retention in City agencies can prevent the most talented individuals from working and advancing in City service. Public servants who take second jobs with private companies doing business with the City can have their objectivity and loyalty challenged and may appear to favor—or even actually favor—their private employer over the City.

Most significantly, unchecked conflicts of interest in New York City government can erode the confidence of the citizens of the City of New York in their government and its elected officials and employees. They can erode a citizen's belief that his or her hard-earned tax dollars are being used for the City services and programs for which they were designated.

While there are certain breaches of the public trust that are appropriately handled criminally—such as the acceptance of bribes by high-level public officials—most breaches are better addressed by local government ethics agencies equipped to enforce civil penalties. A good local government ethics enforcement program has the following features: (1) fairness; (2) effective penalties; (3) a degree of confidentiality prior to final decision; (4) a means of making final findings of conflicts of interest public so that the particular cases can be used for educational purposes; and (5) appellate review.

This chapter reviews the ethics enforcement program of the City of New York's Conflicts of Interest Board, which is committed to combating the conflicts of interest prohibited by the City's conflicts of interest law.

B. The New York City Enforcement Program

The Conflicts of Interest Board is the body charged with enforcing the ethics laws in New York City, which laws are contained in Chapter 68 of the New York City Charter ("Chapter 68") and the Rules of the Conflicts of Interest Board (the "Board Rules"), the City's annual

disclosure law, set forth in Section 12-110 of the New York City Administrative Code, and the lobbyist gift law, found in Sections 3-224 through 3-228 of the Administrative Code and Section 1-16 of the Board Rules. The Board's enforcement function must be distinguished from its *advisory* function. The Board's advisory function pertains only to *prospective* conduct. In this counseling role, the Board dispenses advice to City officials who want to comply with the law and seek approval for proposed future conduct. By contrast, the Board's enforcement function applies to *past* conduct.

The New York City ethics enforcement model ensures certain fundamental indicia of fairness in the legal process: due process of law—including a full and fair opportunity to be heard in an administrative tribunal—and confidentiality of the proceedings until the Board makes a final finding of a conflict of interest. The City's enforcement program also allows for effective monetary and other penalties that serve to deter misconduct in the future, both for the specific respondent and for all other public servants.

Examples of Chapter 68 Violations

The following are some examples of violations of New York City's conflicts of interest law (each of which is discussed in more detail in its respective chapter):

- Holding a prohibited interest or position in a firm that does business with the City.
- Taking an official action to benefit oneself or a person with whom, or a firm with which, one is associated.
- Engaging in conduct that conflicts with one's official duties, such as using City resources for private purposes.
- Taking a gift worth $50 or more from an individual or firm doing business or seeking to do business with the City.
- Using confidential City information to benefit oneself or an associated person or firm or revealing such information for any or no reason.
- Coercing other City employees to work on or contribute to a political campaign.
- Negotiating with City contractors for private jobs when working with those contractors on City matters.
- Entering into a business or financial relationship with a superior or subordinate (*e.g.*, asking one's subordinate for a $1,000 loan or hiring a subordinate to do work on one's home).
- For former public servants, appearing before one's former City agency for pay on a non-ministerial matter within a year of termination of service or working on the same particular matter in the private sector on which one previously worked personally and substantially for the City, or using or revealing confidential City information.

C. Enforcement Procedures

1. Confidentiality

All Board enforcement proceedings and records are confidential, except for the final Board order finding a violation, and then only the Board's findings, conclusions and orders are made public.[1] Confidentiality provisions in enforcement proceedings recognize the tension between, on the one hand, the interest of the party charged with, but not yet convicted of, unethical conduct in preserving his or her reputation and, on the other hand, the right of the public to know when government officials act improperly and that the ethics rules are in fact being enforced. Particular cases can be used for educational purposes as well. For these reasons, in negotiated settlements, the Board requires the violator waive confidentiality so that it is clear that he or she understands that the disposition will be made public.

Chapter 68 makes other limited exceptions to the confidentiality provisions, such as when the Board refers complaints to the New York City Department of Investigation ("DOI") for investigation—although Chapter 68 mandates that referral be confidential between DOI and the Board—or when an alleged violator is subject to related disciplinary proceedings at his or her City agency.

2. Complaints

The Board accepts complaints of conflicts of interest law violations. Complaints do not have to be verified and, in fact, can be made anonymously. Pursuant to Charter § 2607, complaints of violations of the City's lobbyist gift law, found in Sections 3-224 through 3-228 of the Administrative Code, "shall be made, received, investigated and adjudicated in a matter consistent with the investigation and adjudication" of violations of the City's conflicts of interest law. *See* Section C.

The news media also provides an important source of complaints. An article in the newspaper alleging instances of conflicted conduct can trigger an investigation that will determine whether the facts and evidence support the public account. For example, *The New York Times* published an article on April 26, 1993, reporting that the City's former Comptroller had recommended Fleet Securities as a co-manager on a bond issue seven months after the Comptroller's United States Senate campaign had obtained a $450,000 loan from Fleet's affiliate, Fleet Bank. An investigation and eventual Board fine followed.

When the Board receives a complaint, it has five choices as to how to treat that complaint:[2]

(1) Dismiss the complaint if it requires no Board enforcement action;

(2) Refer the complaint to the New York City Department of Investigation for investigation;

(3) Commence an enforcement action against the alleged violator if the complaint provides sufficient facts to support an initial determination that there is probable cause to believe that the public servant violated the City's conflicts of interest law and;

(4) Refer the complaint to the head of the City agency employing the public servant if the violation is minor or if related disciplinary charges are pending at the agency;[3] or

(5) Issue a private warning letter to the public servant. In cases of minor Chapter 68 violations, a private (*i.e.*, non-public and confidential) warning letter may be the best disposition of the case. The letter informs the alleged violator that the reported conduct violated the conflicts of interest law. These letters sometimes prove useful in the enforcement process if a public servant who has been so warned commits another offense.

3. Investigations and Referrals to the Department of Investigation

The Board has no independent investigative authority and must rely on the New York City Department of Investigation ("DOI") to confidentially investigate matters on the Board's behalf.[4] In addition, DOI must report to the Board confidentially on any investigation that involves or may involve violations of the conflicts of interest law, whether the Board referred the matter to DOI or DOI initiated the investigation.[5] Once DOI makes a *confidential* report to the Board,[6] the Board may have additional questions and ask DOI to continue or expand its investigation.

4. Referring Matters to Agencies

Chapter 68 requires the Board to refer an alleged violation of the conflicts of interest law to the head of the City agency employing the alleged violator if related disciplinary charges are pending against the public servant.[7] When the Board refers a matter to an agency, it retains the authority, under City Charter § 2603(h)(6), to pursue a separate enforcement action at the conclusion of the agency disciplinary proceedings, regardless of the outcome of those proceedings. In the interest of conserving resources, saving time, and achieving an equitable result for all parties involved, when the Board makes such referrals, it seeks to resolve the Chapter 68 violations together with the agency disciplinary charges.

If the Board makes a referral to another City agency because related disciplinary charges have been or will be filed against the public servant, the agency head is required to consult with the Board prior to final disposition of the conflicts of interest law violations.[8] This consultation allows the Board to provide guidance on the interpretation of Chapter 68 and fosters consistency and fairness Citywide in the administration of the conflicts of interest law.[9] City agencies also have an obligation to refer complaints of Chapter 68 violations to the Board.[10] The Board, however, retains ultimate jurisdiction to enforce the City's conflicts of interest law, whether the agency elects to take action against its employee or declines to do so.[11] The Board encourages, when appropriate, "three-way" settlements in cases where a City employee, the employee's agency, and the Board can reach a public resolution of the conflicts of interest law charges.[12]

In 2011, the New York State Supreme Court, Appellate Division, First Department, handed down an important decision affirming the ability of agencies to bring disciplinary cases based on Chapter 68 violations beyond the eighteen-month statute of limitations contained in New York Civil Service Law § 75.[13] In *James v. Doherty*, the First Department held that agency disciplinary charges alleging that three Sanitation Workers had used Sanitation trucks to collect commercial garbage—*i.e.*, a non-City purpose in violation of Charter § 2604(b)(2), pursuant to Board Rules § 1-13(b)—satisfied the "crime" exception to the statute of limitations in the Civil Service Law since violations of § 2604 constitute a misdemeanor pursuant to Charter § 2606(c).[14] As a result of this decision, the three Sanitation workers were forced to address the disciplinary charges they had been fighting for nearly seven years and settle their matters with the New York City Department of Sanitation and the Board, resulting in suspensions of sixty or ninety days, valued between $16,697 and $25,046.[15]

In *Rosenblum v. New York City Conflicts of Interest Board*, the New York Court of Appeals held on February 9, 2012, after four years of litigation, that the Board has the authority to independently prosecute a violation of the City's conflicts of interest law.[16] The Court also ruled that the Board can pursue its own enforcement action regardless of any disciplinary action taken or not taken by an employee's agency.[17] In *Rosenblum*, the principals' union brought an Article 78 proceeding, arguing that the New York State Education Law permitted only the New York City Department of Education ("DOE") to impose fines on tenured DOE staff for a violation of the conflicts of interest law. A decision against the Board had the potential to insulate all unionized City workers—roughly 90% of the City workforce—from ethics enforcement, except for discipline by their agencies. Reversing two lower court decisions, the Court of Appeals, made clear that the Board is "an independent enforcement agency" and not an "advisory arm of other City agencies."[18]

D. A Full and Fair Opportunity to Be Heard

1. Notice of Initial Determination of Probable Cause & Response

If the Board finds that there is probable cause to believe that a current or former City employee has violated the conflicts of interest law, the Board will serve the alleged violator with written charges—a "Notice of Initial Determination of Probable Cause."[19] Since the Board has jurisdiction over former public servants,[20] public servants cannot insulate themselves from enforcement action simply by resigning from City service. When warranted, the Board will prosecute a Chapter 68 violation committed by a public servant while in City service even after that public servant has left City service.

The Notice will contain a statement of the facts on which the Board relied in reaching its probable cause finding and a statement of the sections of the Charter the Board believes the current or former City employee has violated.[21] The individual charged with conflicts of interest law violations—the "respondent"—then has fifteen days (twenty days if service of the Notice was by mail) to answer the Notice—the "Response."[22] Respondents have the right to be

represented by counsel or any other person in the Board's enforcement proceedings; the representative is required to submit a written Notice of Appearance to serve in that role.[23]

The purpose of the Response is to provide those charged with violating the law an opportunity to explain, rebut, or provide information concerning the allegations against them.[24] The Board reviews each Response and will either dismiss the case or sustain its initial finding of probable cause.[25] The Board seriously considers the defenses offered by respondents and has dismissed cases at this stage. This means that the process is not *pro forma*, and respondents have a real opportunity to obtain dismissal of a case that should not go forward for reasons—either factual or legal—that might not have been previously considered by the Board. If the Board decides to dismiss a case, the respondent receives a confidential written notice of dismissal.[26]

At any time after the service of a Notice of Probable Cause, the respondent and the Board may agree to dispose of the case by agreement.[27] Most respondents elect to negotiate a settlement instead of going to trial. The Board Rules require all settlements be reduced to writing and signed by the public servant or his or her representative and the Board. The Board also requires that all dispositions contain an acknowledgment that a public servant's conduct has violated a provision of Chapter 68 and that the disposition be made public by the Board. *See* Section D.

If the Board sustains its finding of probable cause *and* the respondent is a current City employee who is subject to any state law or collective bargaining agreement providing for the conduct of disciplinary proceedings, the Board is required to refer the matter to the appropriate City agency and the agency must consult with the Board prior to a final decision.[28] *See* Section C(1)(4).

2. Commencing Formal Proceedings at OATH

Enforcement actions that are not resolved after the Notice of Probable Cause will proceed to the New York City Office of Administrative Trials and Hearings ("OATH"). If the Board sustains its finding of probable cause, after any agency-referral process has been completed, the Board will direct a hearing to be held at the OATH.[29] OATH is New York City's central administrative tribunal and hears cases originating from a wide variety of City agencies.[30] Although the Board has the authority to hear cases itself, it delegates its hearing function to OATH, which employs professional administrative law judges and has courtrooms equipped with recording capabilities. The use of such a central tribunal creates great efficiencies, eliminates the need for the Board to have its own hearing facilities, and adds another layer of professionalism, independence, and formality to the proceedings. To prevail at OATH, the Board's enforcement counsel must produce admissible evidence, including witnesses and documents, proving the alleged violations by a preponderance of the evidence.[31]

To commence a proceeding at OATH, the Board's enforcement counsel serves a written Petition on the Respondent and files that Petition at OATH.[32] The Respondent may serve and file an Answer (eight days after service of Petition, thirteen days if service was by mail).[33] The failure to answer means that all the allegations of the Petition are deemed admitted.[34] Pleadings may be amended within twenty-five days prior to hearing. If a party wishes to amend the

pleadings fewer than twenty-five days prior to trial, there must be consent or leave of the Board or of the assigned OATH administrative law judge.[35] After the service of the Petition, enforcement counsel is prohibited from communicating *ex parte* with any member of the Board about that case, except with the consent of respondent or respondent's counsel or regarding a ministerial matter.[36] During this time, the Board's Legal Advice Unit serves as counsel to the Board, and, as a result, enforcement counsel and advice counsel do not discuss the merits of, or share documents about, the case.

3. Procedural Rules for Hearings at OATH

The Board Rules set forth the procedural rules for all Board proceedings. Once the Board petitions OATH to hear a case, the OATH Rules of Practice apply, but the Board Rules govern in case of a conflict between the two sets of procedural rules.[37] The New York Civil Practice Law and Rules ("CPLR"), which contain the procedural rules governing civil cases brought in the state courts of New York, do not govern in administrative proceedings such as the Board's hearings, except as provided in particular Board or OATH rules that expressly incorporate provisions of the CPLR.[38]

There is no right to take depositions of witnesses prior to the hearing; depositions may be taken only upon motion before the OATH administrative law judge for "good cause shown."[39] Parties can request and exchange documentary discovery, which must be completed reasonably in advance of the hearing to allow for the parties to prepare for the hearing.[40]

Only an administrative law judge at OATH or a Board member may issue subpoenas for witnesses and documents.[41] An OATH rule adopted in 1998 removes attorneys' ability to issue subpoenas in OATH cases and requires the parties to have subpoenas signed by an administrative law judge.[42] Subpoenas can be used to compel production of documents or attendance of witnesses at or prior to a hearing. Under OATH's subpoena rule, the party seeking the subpoena is deemed to be making a motion, which can be made on twenty-four hours' notice to the opposing party, including by e-mail.[43] OATH continues to encourage the making and scheduling of requests for subpoenas by conference call to the assigned administrative law judge.

At OATH, each case is assigned two different administrative law judges: a settlement judge and a trial judge. Unless the parties' views of the necessary outcome are so divergent that settlement seems impossible, the parties must be prepared to engage in serious settlement discussions at a conference scheduled prior to the commencement of trial.[44] If the settlement judge cannot resolve the matter at the conference, the trial judge presides at the hearing. This two-judge approach promotes settlements and allows the parties to speak freely with a neutral third party about the strengths and weaknesses of the case without fear of prejudicing the trier of fact.

Hearings in Board enforcement actions are not public unless requested by the respondent. At trial, each side may present an opening statement summarizing the case and the proof. The Board's enforcement counsel makes the first presentation; the prosecuting attorney has the burden to prove the case by a preponderance of the evidence and must initiate the presentation of

the evidence.[45] The respondent, either on his or her own or by counsel or other representative, then presents his or her case. Enforcement counsel may present rebuttal evidence.[46]

Witnesses testify under oath and on the record. The parties or their counsel (or other representative, since non-lawyers may appear at OATH[47]) conduct direct and cross-examination. The rules of evidence are relaxed, and hearsay is admissible,[48] although generally hearings are conducted much like trials in state supreme court. After the close of the evidence, each side may present a closing statement.[49] This time, the respondent goes first. OATH makes an audio recording of the proceedings, which OATH has transcribed into a verbatim transcript and provides to the parties at no cost.

4. Post-Hearing Procedure

After the close of the trial, the OATH administrative law judge considers the full record of the case, including the witness testimony and exhibits, and issues a confidential, non-binding written report and recommendation to the Board with a copy to the respondent or the respondent's representative.[50] This report and recommendation includes findings of fact, conclusions of law, and a proposed penalty, if applicable.

The parties (*i.e.,* the respondent or the respondent's representative and enforcement counsel) have ten calendar days from service of the OATH administrative law judge's report and recommendation to submit comments to the Board.[51] The Board gives deference to the administrative law judge's findings, but the Board reaches its own decision and is free to accept, reject, or modify the recommendations of the administrative law judge. The Board considers the administrative law judge's report and all of the evidence in the record, as well as any comments submitted by the parties before issuing its final determination, the Final Findings of Fact, Conclusions of Law, and Order (herein, an "Order").[52] If the Board finds a violation, the Order is made public. If no violation is found, the Order is not made public by the Board (although the respondent may make the Order public, if he or she chooses).

If the Board finds a violation, it may impose an appropriate penalty. *See* Section F(1) (Penalties for Violations of the Conflicts of Interest Law). However, before imposing a penalty, the Board must first consult with the head of the agency employing the respondent regarding the penalty.[53]

The exception to this practice involves respondents who are Members of the City Council and Council staff. For these public servants, the Board does not impose a penalty as part of its final order, but rather sends a public recommendation to the Council of the penalty the Board deems appropriate. The Council is then required to report to the Board as to what action the Council takes on the Board's recommendation.[54]

Examples of Board Decisions Following OATH Hearings

In April 1996, in the case of former City Comptroller Elizabeth Holtzman, after a full trial on the merits, the Board fined Holtzman $7,500 (of a maximum $10,000) for violating

Charter § 2604(b)(3) (prohibiting use of public office for private gain). The Board also found that she had violated Charter § 2604(b)(2) (prohibiting conduct that conflicts with the proper discharge of official duties) with respect to her participation in the selection of a Fleet Bank affiliate as a co-manager of a City bond issue when she had a $450,000 loan from Fleet Bank to her United States Senate campaign, a loan she had personally guaranteed.[55] The New York Court of Appeals upheld the Board's $7,500 fine and Decision and Order that Holtzman's use of her City office to obtain a three-month delay in the debt collection process was the type of impermissible advantage that Charter § 2604(b)(3) prohibited.[56]

In another case, the Board fined Kerry Katsorhis, former Sheriff of the City of New York, $84,000 for numerous ethics violations. This is the largest fine ever imposed by the Board, and it was collected in full. Katsorhis habitually used City letterhead, supplies, equipment, and personnel to conduct his outside law practice. He had correspondence to private clients typed by City personnel on City letterhead during City time and then mailed or faxed using City postage meters and fax machines. Katsorhis endorsed a political candidate using City letterhead and attempted to have the Sheriff's office repair his son's personal laptop computer at City expense. Katsorhis also attempted to have a City attorney represent one of Katsorhis's private clients at a court appearance. In 2000, the New York State Supreme Court, Appellate Division, First Department, twice dismissed as untimely a petition to review the Board's decision, and the New York Court of Appeals dismissed as untimely a motion seeking leave to appeal the Appellate Division's orders. Accordingly, all appeals were exhausted, and the Board decision stands.[57]

5. Appeals to the State Courts: Supreme Court, Appellate Division, and Court of Appeals

The prerequisite to appeal to the courts is *final* action by the Board. Prior to a final Board order, an appeal would be premature. The familiar legal principle in administrative law of "exhaustion of administrative remedies" requires that the person aggrieved by a government agency's decision complete the administrative process (where he or she may find redress) before challenging the final agency action in the courts.

In *Katsorhis*, pursuant to CPLR 7804(g), the parties bypassed the court of first instance (the New York State Supreme Court) and proceeded directly to the Appellate Division. Similarly, in *Holtzman*, the parties proceeded directly to the Appellate Division. In both cases, the principal issue was whether there was "substantial evidence" to support the Board's decision. The Appellate Division upheld the Board's ruling in *Holtzman* and dismissed *Katsorhis* for failure to timely perfect the appeal (by filing the record and a legal brief within the nine months allowed under that court's rules).

On April 30, 1998, the New York Court of Appeals unanimously affirmed the Appellate Division, First Department, decision confirming the Board's decision in *COIB v. Holtzman*.[58] In that decision, the Court of Appeals, New York State's highest court, upheld the Board's reading of the standard of care applicable to public officials: "A City official is chargeable with knowledge of those business dealings that create a conflict of interest about which the official

'should have known.'"[59] (Imputed knowledge is discussed in greater detail in Section E(4) below.) The Court also found that Holtzman had used her official position for personal gain by encouraging a "quiet period" that had the effect of preventing Fleet Bank from discussing repayment of her Senate campaign loan. The Court held: "Thus, she exhibited, if not actual awareness that she was obtaining a personal advantage from the application of the quiet period to Fleet Bank, at least a studied indifference to the open and obvious signs that she had been insulated from Fleet's collection efforts."[60] Finally, the Court held that the Federal Election Campaign Act does not preempt local ethics laws.

E. Dispositions by Agreement

It is possible to reach a "disposition by agreement" at any point in the course of any enforcement proceeding.[61] Any such disposition must contain a statement that the respondent violated Chapter 68 or the Administrative Code and must be made public.[62] This publication requirement has a salutary effect. It apprises the public of the Board's work and its application of the conflicts of interest law; it also reassures the public that the City's ethics laws are being enforced and taken seriously. Moreover, publication puts enforcement to work as a part of the Board's education program: teaching by example. Publication helps hold public servants accountable for their misconduct, as well as showing other public servants that their colleagues who violate the conflicts of interest law do not escape redress.

Dispositions by agreement afford those charged with violating the conflicts of interest law the opportunity to accept responsibility for their misconduct. Often, a negotiated settlement, in which the respondent can have input into the penalty and the description of his or her conduct in the public disposition and where only the disposition itself is public, will be more palatable to the respondent than a full trial, which carries the risk of an administrative or even judicial finding, on a fully developed public record, that his or her conduct was improper. Early settlements spare both the City and the individual charged with conflicts of interest violations a great deal of time and resources.

All of the Board's public dispositions, as well as summaries of those dispositions, are available through the Board's website, http://www.nyc.gov/ethics.

1. Dispositions Imposing Fines & Penalty Payment

A disposition by agreement that contains an admission by the respondent of the violation is referred to as a "Public Disposition." Such settlements require a meaningful statement of facts, an admission by the respondent that by those facts he or she violated the conflicts of interest law, and an agreement that the disposition is public. The Board may also impose an appropriate penalty for the violation. The Board obtained disgorgement authority by an amendment to Chapter 68 authorized by the voters of the City of New York in the November 2010 election. With that amendment, in addition to the ability to impose an increased maximum fine of $25,000 per violation, the Board can order payment to the City of the value of any gain or benefit obtained

by the respondent as a result of his or her violation of Chapter 68.[63] *See* Section F(1) (Penalties for Violations of the Conflicts of Interest Law).

Financial Hardship Applications

Many City employees do not have the resources to pay large fines, so the Board takes into account demonstrated financial hardship in setting the amount of the fine. For example, in *COIB v. Matos*, COIB Case No. 1994-368 (1996), the respondent admitted to a conflicts of interest law violation and agreed to pay a $1,000 fine for sending a resume to a City contractor while the official was directly concerned with that contractor's particular matter with the City. However, in *Matos*, the Board agreed to forgive a portion of the fine in recognition of the respondent's unemployment and actual financial hardship, as shown by sworn affidavit. Any respondent who seeks a reduction in the amount of a Board fine based on a claim of financial hardship is required to complete a form showing monthly income and expenses and overall assets and liabilities, both for the respondent and his or her spouse or domestic partner, accompanied by documents (such as tax returns, bank statements, loan documents, utility bills, and the like) substantiating each of the claimed amounts.

Penalty Payment Plans

If the respondent is unable to pay the fine in full at the time of the settlement, the Board has on occasion entered into settlements that extend payments over a period of time. Such payment plans are, however, the exception. The Board requires a confession of judgment in such cases, to avoid protracted collection problems if the respondent defaults on the settlement payment schedule. A respondent who wishes to settle but lacks funds to pay the requisite fine may agree to disgorge ill-gotten gains by signing over to the City, for example, payments he will receive from unauthorized moonlighting with a company that does business with the City and resign the outside employment that offends the conflicts of interest law. In one such case, the Board fined a firefighter $7,500 for unauthorized moonlighting with a distributor of fire trucks and spare parts to the New York City Fire Department. As part of the settlement, the firefighter agreed to disgorge income from his after-hours job, and the vendor, in effect, funded the settlement out of payments due the firefighter.[64]

2. Public Warning Letters

The Board can also, at its discretion, resolve an enforcement action with a "public warning letter." A public warning letter contains a meaningful statement of facts, an explanation of how those facts constitute a violation of the conflicts of interest law, and an agreement that the disposition is public. However, unlike a disposition imposing a fine, a public warning letter does not require any admission of a violation of the law by the respondent or a monetary fine. Rather, the public warning letter serves as a public statement by the Board, directed to the respondent in particular but to all public servants in general, advising that the conducted described in the letter constitutes a violation of the conflicts of interest law. As with a disposition imposing a fine, the respondent has the opportunity to have input into the description of his or her conduct contained in the public warning letter.

Generally speaking, the Board will agree to resolve an enforcement action with a public warning letter in certain circumstances, such as matters where (1) the violation is serious but limited in frequency or unlikely to reoccur (because the respondent is no longer a public servant or no longer in the City position that gave rise to the violation); (2) the respondent was already the subject of a serious penalty as a consequence of agency disciplinary action; or (3) the charged violation was of such a nature that the respondent might not have been aware that his or her conduct violated the conflicts of interest law.

An example of the first two instances can be found in *COIB v. Chapman*, in which the Board issued a public warning letter to a former Associate Director at Coney Island Hospital—a NYC Health + Hospitals ("HHC") facility—who disclosed a confidential bid provided to him by one vendor to a second vendor, for which disclosure the Associate Director had no legitimate City purpose.[65] In *Chapman*, the Board determined that no further enforcement action was warranted in the case because the former Associate Director had resigned from HHC in the face of pending HHC disciplinary action related to this and other misconduct.

An example of the third type can be found in *COIB v. McHugh*, in which the Board issued a public warning letter to a former Commanding Officer at the New York City Police Department ("NYPD") Office of Labor Relations who, after retiring from the NYPD, was retained as an expert witness in a lawsuit against the City, in which lawsuit he had personally and substantially participated while at the NYPD.[66] Since the former Commanding Officer represented to the Board that he did not recall participating in the matter while at the NYPD—and his involvement consisted of attending one meeting at which he was consulted by the City's attorneys concerning the lawsuit's allegations—the Board took the opportunity of the public letter in *McHugh* to make clear that public servants have a duty to conduct a reasonable inquiry to determine whether they have ever personally and substantially participated in a particular matter on which they are considering working after leaving City service.

An example of an isolated infraction resulting from the public servant's lack of awareness that her conduct violated the conflicts of interest law can be found in *COIB v. Brandt.* In *Brandt*, the Board issued a public warning letter to a Member of Manhattan Community Board No. 2 ("CB 2") who self-reported to the Board that she had appeared in her private capacity as an architect on behalf of a paying client during a meeting of CB 2's Landmarks Committee.[67] In deciding to issue a public warning letter instead of imposing a fine, the Board took into consideration that the Member self-reported her conduct to the Board and, prior to appearing before CB 2, received advice from the CB2 Chair that she was permitted to appear so as long as she recused herself from voting on the matter, which she did. The Board took the opportunity of the public warning letter in *Brandt* to remind community board members that the City's conflicts of interest law prohibits them from making compensated appearances before their own community boards on behalf of private interests.

F. Penalties

1. Penalties for Violations of the Conflicts of Interest Law

Under Chapter 68, the Board may impose the following penalties for violations of the City's conflicts of interest law:

(1) A civil monetary fine of up to $25,000 per violation.[68]

(2) Payment to the City of the value of any gain or benefit obtained by the current or former public servant as a result of his or her violation of the conflicts of interest law.[69]

2012 was the first year that the Board utilized this power, granted, as noted above, by the City's voters by referendum on November 2, 2010. In *COIB v. S. Taylor*, the first case of its kind in the City, in addition to imposing a $7,500 fine for the multiple violations of Chapter 68 committed by a former Assistant to the Chief Engineer in the Bureau of Engineering at the New York City Department of Sanitation ("DSNY"), the Board also ordered him to pay the value of the benefit he received as a result of his prohibited superior-subordinate financial relationship (Charter § 2604(b)(14)), namely, the referral fee of $1,696.82 he received for referring a DSNY subordinate to an attorney to represent her in a personal injury lawsuit.[70] In *COIB v. Namnum*, a former Director of Central Budget for the New York City Department of Education ("DOE") paid a $15,000 fine for using his DOE position to obtain a DOE job for his wife (Charter § 2604(b)(3)); in addition to the fine, he also paid the value of the benefit he received as a result of his violations, namely, the total of his wife's net earnings from her employment at DOE, in the amount of $32,929.29, for a total financial penalty of $49,929.29.[71]

(3) Recommend suspension or removal from office after consultation with the relevant agency head.[72]

(4) Void a contract or transaction (after consultation with the agency head).[73]

In *Holtzman*, former Mayor David Dinkins removed Fleet Securities as a co-manager of bonds under his own powers on May 13, 1993, almost immediately after the press reported the story. The Mayor's action preceded the Board's enforcement proceedings.

(5) A violation of Chapter 68 is a misdemeanor if prosecuted in a separate criminal proceeding, generally by one of the City's District Attorneys. Upon conviction, the City official must forfeit public office or employment.[74]

In *People v. Basil Randolph Jones*—the first criminal jury trial and conviction of a Chapter 68 violation since the 1990 Charter revisions strengthened the enforcement provisions of Charter 68—a New York City Department of Finance Deputy Tax Collector was convicted of two felonies (offering a false instrument for filing) and of a misdemeanor violation of the Charter for holding an interest in a firm engaged in business dealings with the City while he was employed by the City.[75] Jones had denied that he worked for the Department of Finance when he applied, in his private sector

capacity, to the New York City Department of Housing Preservation and Development for a $1 million contract to manage and rehabilitate City buildings. He was sentenced to five years' probation, fined $5,000, and ordered to perform 100 hours of community service relating to housing. He also cooperated with the government in a separate case that involved allegations of systemic corruption.

In 2006, Bernard Kerik, former New York City Police Commissioner, pled guilty to misdemeanor charges that, when he was Commissioner of the New York City Department of Correction, he accepted a gift of renovation work on his apartment, valued at approximately $165,000, from a firm that was seeking to do business with the City, in violation of Charter § 2604(b)(5), and also failed to list indebtedness in excess of $5,000 on his annual financial disclosure report filed with the Board in 2002, in violation of the City's financial disclosure law. Pursuant to a plea agreement, Kerik paid a criminal fine of $206,000 and a civil fine to the Board in the amount of $15,000.[76]

Conviction for buying public office leads to lifetime disqualification from election, appointment, or employment in City service.[77]

Imputed Knowledge

Actual knowledge of a business dealing with the City is required for criminal conviction based on holding a prohibited interest.[78] However, for purposes of all cases involving civil penalties, Chapter 68 imputes knowledge of business dealings with the City under a "should have known" standard.

The concept of imputed knowledge is a central concept in Chapter 68. For example, public servants may not accept gifts from donors they know or should know engage in, or even *intend* to engage in, business dealings with the City. The burden is on public servants to inquire about the business dealings and intended business dealings of those who try to bestow gifts upon them.

In 2000, the Board defined for the first time the duty of high-level public servants to inquire about the City business dealings of the donor. In *In re Safir*, the Board rebuked then former New York City Police Commissioner for accepting a free trip, valued at over $7,000, to the 1999 Academy Awards festivities in Los Angeles from a firm (Revlon) doing business with the City.[79] Because this was the first public announcement of this duty, and Revlon's business dealings with the City were small and difficult to discover, the Board declined to charge the Police Commissioner with violating the Board's Valuable Gift Rule, which prohibits public servants from accepting gifts valued at $50 or more from persons they know or should know engage or intend to engage in business dealings with the City.[80] The Police Commissioner repaid the cost of the trip.

2. Penalties for Violations of the Annual Disclosure Law

Penalties for violating the City's annual disclosure law—about which more information can be found in the chapter devoted to that subject—are similar to penalties for violating the City's conflicts of interest law:

(1) Monetary fines up to $10,000 for each intentional violation (failure to file, failure to pay a late fine, failure to include assets or liabilities, or misstatements of assets or liabilities).[81]

In 2009, the former Executive Director of the Bellevue Hospital Center, a facility of NYC Health + Hospitals, acknowledged that, in the annual financial disclosure reports he was required to file with the Board for calendar years 2000, 2001, and 2002, he failed to disclose certain assets, loans, and gifts. For these violations of the City's financial disclosure law, along with other violations of the City's conflicts of interest law, the former Executive Director was fined $12,500 by the Board.

(2) An intentional violation is a misdemeanor punishable by imprisonment up to a year, a fine of up to $1,000, or both, and is grounds for disciplinary penalties, including removal from office.[82] Criminal proceedings are brought by other law enforcement agencies.

(3) Disclosure of confidential information contained in an annual disclosure report filed with the Board is a misdemeanor punishable by imprisonment up to a year, a fine of up to $1,000, or both, and is grounds for disciplinary penalties, including removal from office.[83]

3. Penalties for Violations of the Lobbyist Gift Law

Penalties for violations of the lobbyist gift law are prescribed by statute.[84] Any person who "knowingly and willfully violates" the lobbyist gift law is subject to a civil penalty. For the first offense, the fine must be between $2,500 and $5,000 dollars; for the second offense, between $5,000 and $15,000; and for the third and subsequent offenses, between $15,000 and $30,000. In addition to such civil penalties, for the second and subsequent offenses, the violator will also "be guilty of a class A misdemeanor."[85]

In *COIB v. Levenson,* a case of first impression, the Board fined a lobbyist $4,000 for expending corporate resources and providing free consulting services, valued at $3,796.44, to aid a Council Member's bid to become Speaker of the City Council.[86] The Speaker is a leadership position within the City Council, not an independent public office; the process by which the Council chooses a Speaker is not an "election" under the Election Law. Therefore, the lobbyist's volunteer efforts to assist with a Council Member's campaign for Speaker constituted a gift subject to the lobbyist gift law, which prohibits lobbyists from offering or giving a gift of any value to a public servant.

G. Conclusion

The primary purpose of enforcement lies not in punishing public servants but in preventing future conflicts of interest violations. The Board views its enforcement mandate as both educational and preventative.

A successful enforcement program can reduce waste, encourage compliance by officials who might otherwise err, promote integrity in government decision-making, and increase public confidence in its officials who are elected or appointed to serve the people. Fair, swift, and sensible enforcement fosters good government by ensuring that scarce public resources are properly allocated and deployed for the right reasons. The Board aspires to this ideal in its enforcement program and to educating City employees through its enforcement dispositions so that future violations of Chapter 68 are avoided.

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[1] Charter §§ 2603(h)(4), 2603(k); Board Rules §§ 2-05(f), 2-05(h).
[2] *See generally* Charter § 2603(e).
[3] Charter § 2603(e)(2)(d).
[4] Charter § 2603(f).
[5] Charter § 2603(f)(2).
[6] Charter § 2603(f)(1).
[7] *See* City Charter § 2603(e)(2)(d)
[8] *See* Board Rules § 2-04(c).
[9] *See generally* Report of the New York City Charter Revision Commission, December 1986-November 1988, Vol. II, at 165.
[10] Charter § 2603(g)(2).
[11] *See* Charter § 2603(h)(6). *See also Rosenblum v. New York City Conflicts of Interest Board,* 18 N.Y.3d 422, 964 N.E.2d 1010, 941 N.Y.S. 2d 543 (2012).
[12] In 2015, the Board entered into 47dispositions with public servants and their agencies, out of 76 public dispositions imposing financial penalties during that year.
[13] Civil Service Law § 75(4) states: "Notwithstanding any other provision of law, no removal or disciplinary proceeding shall be commenced more than eighteen months after the occurrence of the alleged incompetency or misconduct complained of and described in the charges or, in the case of a state employee who is designated managerial or confidential under article fourteen of this chapter, more than one year after the occurrence of the alleged incompetency or misconduct complained of and described in the charges, provided, however, that such limitations shall not apply where the incompetency or misconduct complained of and described in the charges would, if proved in a court of appropriate jurisdiction, constitute a crime."

[14] *James v. Doherty*, 85 A.D.3d 640, 925 N.Y.S.2d 818 (1st Dep't 2011).
[15] *COIB v. M. James*, COIB Case No. 2007-269 (2012); *COIB v. Gilbert*, COIB Case No. 2007-269a (2012); *COIB v. Maurice*, COIB Case No. 2007-269b (2012).
[16] 18 N.Y.3d 422, 964 N.E.2d 1010, 941 N.Y.S. 2d 543 (2012).
[17] *See* City Charter § 2603(h)(6).
[18] 18 N.Y.3d at 432, 964 N.E.2d at 1016, 941 N.Y.S. 2d at 549.
[19] Board Rules §§ 2-01(a), 2-05(e).
[20] *See* Charter § 2603(e)(3), (g)(3), (h)(7).
[21] Board Rules § 2-01(a).
[22] Board Rules §§ 2-01(a), 2-05(e).
[23] Board Rules § 2-05(a)(1).
[24] Board Rules § 2-01(a).
[25] Board Rules § 2-02(a).
[26] Board Rules § 2-01(d).
[27] Board Rules § 2-05(h).
[28] Charter § 2603(h)(2). *See generally* Report of the New York City Charter Revision Commission, December 1986-November 1988, Vol. II, at 165.
[29] Charter § 2603(h)(2); Board Rules §§ 2-01(d), 2-02.
[30] *See* Chapter 45-A of the Charter.
[31] Charter § 2603(h)(2); Board Rules §§ 2-01(d), 2-02.
[32] Board Rules § 2-02(b).
[33] Board Rules §§ 2-02(c), 2-05(e).
[34] Board Rules § 2-02(c)(3).
[35] Charter § 2603(h)(4); Board Rules § 2-05(f).
[36] Board Rules § 2-05(g).
[37] Board Rules § 2-05(i).
[38] *See* CPLR 101 (CPLR applies to "civil judicial proceedings"); *U. S. Power Squadrons v. State Human Rights Appeal Bd*. 84 A.D.2d 318, 445 N.Y.S.2d 565 (2d Dep't 1981), *aff'd*, 59 N.Y.2d 401, 465 N.Y.S.2d 871, 452 N.E.2d 1199 (1983) ("the CPLR is applicable to 'civil judicial proceedings' and not to administrative proceedings").
[39] OATH Rules of Practice §1-33.
[40] OATH Rules of Practice §1-33.
[41] Board Rules § 2-03(b). *See also* CPLR 2302(a).
[42] OATH Rules of Practice § 1-43.
[43] OATH Rules of Practice § 1-43(b).
[44] OATH Rules of Practice § 1-31(a).
[45] Board Rules § 2-03(d)(3).
[46] Board Rules § 2-03(d)(3).
[47] *See* OATH Rules of Practice § 1-11(a).
[48] OATH Rules of Practice § 1-46(a).
[49] Board Rules § 2-03(d)(3).
[50] Board Rules §§ 2-04(a), (b).
[51] Board Rules § 2-04(a).
[52] Board Rules § 2-04(b).
[53] Charter § 2603(h)(3).

[54] Charter § 2603(h)(3); Board Rules § 2-04(b).
[55] *COIB v. Holtzman*, COIB Case No. 93-121 (1996).
[56] *Holtzman v. Oliensis*, 240 A.D.2d 254, 659 N.Y.S.2d 732 (1st Dep't 1997), *aff'd*, 91 N.Y.2d 488, 673 N.Y.S.2d 23, 695 N.E.2d 1104 (1998).
[57] *COIB v. Katsorhis*, COIB Case No. 94-351 (1998), *appeal dismissed, Katsorhis v. Oliensis*, M-1723/M-1904 (1st Dep't Apr. 13, 2000), *appeal dismissed*, 95 N.Y.2d 918, 719 N.Y.S.2d 645 (Nov. 21, 2000).
[58] *Holtzman v. Oliensis*, 91 N.Y.2d 488, 673 N.Y.S.2d 23, 695 N.E.2d 1104 (1998).
[59] 91 N.Y.2d at 497.
[60] 91 N.Y.2d at 498.
[61] Board Rules § 2-05(h).
[62] Board Rules § 2-05(h).
[63] Charter § 2606(b-1).
[64] *COIB v. Ludewig*, COIB Case No. 1997-247 (1999).
[65] COIB Case No. 2011-428 (2014).
[66] COIB Case No. 2008-129 (2010).
[67] COIB Case No. 2015-551 (2016).
[68] Charter § 2606(b).
[69] Charter § 2606(b-1).
[70] *COIB v. S. Taylor*, COIB Case No. 2011-193 (2012).
[71] *COIB v. Namnum*, COIB Case No. 2011-860 (2012).
[72] Charter § 2606(b).
[73] Charter § 2606(a).
[74] Charter § 2606(c).
[75] People v. Basil Randolph Jones, No. 94N088188 (Sup. Ct. N.Y. County 1996),
[76] William K. Rashbaum & John Holusha, "Kerik Pleads Guilty for Gifts and a Loan," N.Y. TIMES, June 30, 2006, at http://nyti.ms/1how7OI.
[77] Charter § 2606(c).
[78] *Id*.
[79] *In re Safir*, COIB Case No. 1999-115 (2000).
[80] *See* Charter § 2604(b)(5).
[81] Administrative Code § 12-110(g)(2).
[82] *Id.*.
[83] Administrative Code § 12-110(g)(3).
[84] Admin. Code § 3-227.
[85] *Id*.
[86] COIB Case No. 2014-903a (2016). *See also COIB v. Mark-Viverito*, COIB Case No. 2014-903 (2016).