

## CONFLICTS OF INTEREST BOARD

### NOTICE

Notice of Adoption of Rule Defining City Employees Involved in the Negotiation, Authorization, or Approval of Contracts and of Certain Other Matters within the Meaning of Section 12-110(b)(3)(a)(4) of the Administrative Code

NOTICE IS HEREBY GIVEN PURSUANT TO THE AUTHORITY VESTED IN the Conflicts of Interest Board by Section 2603(a) of the New York City Charter and Section 12-110(b)(3)(a)(4) of the New York City Administrative Code that the Conflicts of Interest Board has adopted a new rule, Section 1-15 of Title 53 of the Rules of the City of New York, defining City employees involved in the negotiation, authorization, or approval of contracts and of certain other matters within the meaning of Section 12-110(b)(3)(a)(4) of the Administrative Code. Pursuant to a notice published on November 17, 2003, in the City Record, a public hearing was held on December 29, 2003, at 2 Lafayette Street, Suite 1010, New York, New York. The Board received no comments and adopted the proposed rule as final. The text of the new rule is set forth below.

Section 1-15 of the Rules of the City of New York is amended by adding a new Section 1-15, to read as follows:

(New Section 1-15 is underscored)

### § 1-15. CITY EMPLOYEES WHOSE DUTIES INVOLVE THE NEGOTIATION, AUTHORIZATION, OR APPROVAL OF CONTRACTS AND OF CERTAIN OTHER MATTERS.

(a) For purposes of Administrative Code § 12-110(b)(3)(a)(4), a City employee shall be deemed to have duties that involve the negotiation, authorization, or approval of contracts, leases, franchises, revocable consents, concessions, and applications for zoning changes, variances, and special permits if the employee performs any of the following duties:

- (1) Determines the substantive content of a request for proposals or other bid request or change order.
- (2) Makes a determination as to the responsiveness of a bid or the responsibility of a vendor or bidder.
- (3) Evaluates a bid.
- (4) Negotiates or determines the substantive content of a contract, lease, franchise, revocable consent, concession, or application for a zoning change, variance, or special permit or change order.
- (5) Recommends or determines whether or to whom a contract, lease, franchise, revocable consent, concession, or application for a zoning change, variance, or special permit or change order should be awarded or granted.
- (6) Approves a contract, lease, franchise, revocable consent, or concession or change order on behalf of the City or any agency subject to Administrative Code § 12-110; or
- (7) Determines the content of or promulgates City procurement policies, rules, or regulations.

(b) Clerical personnel and other public servants who, in

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relation to the negotiation, authorization, or approval of contracts, leases, franchises, revocable consents, concessions, and applications for zoning changes, variances, and special permits, perform only ministerial tasks shall not be required to file a financial disclosure report pursuant to Administrative Code § 12-110(b)(3)(a)(4). For example, public servants who are under the supervision of others and are without substantial personal discretion, and who perform only clerical tasks (such as typing, filing, or distributing contracts, leases, franchises, revocable consents, concessions, or zoning changes, variances, or special permits or calendaring meetings or who identify potential bidders or vendors) shall not, on the basis of such tasks alone, be required to file a financial disclosure report. Similarly, public servants who write a request for proposals, bid request, change order, contract, lease, franchise, revocable consent, concession, or application for a zoning change, variance, or special permit or procurement policy, rule, or regulation under the direction of a superior but who do not determine the substantive content of the document shall not, on the basis of such tasks alone, be required to file a financial disclosure report.

STATUTORY AUTHORITY: Sections 2603(a) of the New York City Charter and Section 12-110(b)(3)(a)(4) of the New York City Administrative Code.

Statement of Basis of Purpose OF THE RULE:

As mandated by New York State law, the City's Financial Disclosure Law requires the filing of an annual financial disclosure report by, among others,

Each city employee whose duties at any time during the preceding calendar year involved the negotiation, authorization or approval of contracts, leases, franchises, revocable consents, concessions and applications for zoning changes, variances and special permits, as defined by rule of the conflicts of interest board and as annually determined by his or her agency head, subject to review by the conflicts of interest board.

Ad. Code § 12-110(b)(3)(a)(4), as amended by Local Law 43 of 2003, effective January 1, 2004. See also NYS Gen. Mun. Law §§ 811(1)(a), 813(9)(k). The Board must, therefore, adopt a rule defining these so-called "contract" filers.

The Board must also adopt a separate rule regulating appeals by public servants who contest their designation as "contract" filers. See Ad. Code § 12-110(c)(2), as amended by Local Law 43 of 2003. Historically, determination of such appeals by unionized employees has consumed considerable time of the filer's agency, which makes the initial determination as to whether the agency correctly identified the public servant as a "contract" filer and provides documentation in support of that initial determination; the filer's union, which prosecutes the appeal; the Office of Labor Relations, which currently defends the appeal; the Office of Collective Bargaining, which currently hears the appeal and makes a recommendation; the Department of Investigation, which currently makes the final determination of the public servant's filing status; and the Board, which currently provides technical and legal support throughout the appeal process. As of January 1, 2004, appeals will be determined by the Board. See Ad. Code § 12-110(c)(2), as amended by Local Law 43 of 2003.

Moreover, in the Board's experience, agencies differ widely in their interpretation of what constitutes the "negotiation, authorization or approval of contracts." Some agencies include everyone involved in purchasing, even clerical help; other agencies include only procurement officers. Little uniformity exists among agencies in interpreting this provision of law.

As the Board has often stated, the purpose of the City's ethics laws, including its Financial Disclosure Law, lies in promoting both the reality and the perception of integrity in City government by preventing conflicts of interest before they occur. The focus, therefore, lies on prevention, not punishment. Thus, financial disclosure focuses the official's attention at least once each year upon the Conflicts of Interest Law; alerts the public, the media, supervisors, vendors, and the filer to his or her possible conflicts of interest, thereby helping to avoid them; and provides a check on transactional disclosure and recusal by a public servant when a potential conflict actually arises.

In light of the foregoing, the Board's intent in drafting the rule is threefold: (1) to limit financial disclosure filing to those public servants who are at risk of conflicts of interest; (2) to ensure that rules for determining who is a "contract" filer are uniform and uniformly applied throughout the City; and (3) to reduce the number of appeals by defining with some precision who should and should not be filing a financial disclosure report because of "contracting" duties.

[Financial Disclosure: FD Amendments: Contracting Duties

**CITY OF NEW YORK  
CONFLICTS OF INTEREST BOARD**

Notice of Adoption of Rule Defining "Policymaking Position" within the  
Meaning of Section 12-110(b)(3)(a)(3) of the Administrative Code

NOTICE IS HEREBY GIVEN PURSUANT TO THE AUTHORITY VESTED IN the Conflicts of Interest Board by Section 2603(a) of the New York City Charter and Section 12-110(b)(3)(a)(3) of the New York City Administrative Code that the Conflicts of Interest Board has adopted a new rule, Section 1-14 of Title 53 of the Rules of the City of New York, defining "policymaking position" within the meaning of Section 12-110(b)(3)(a)(3) of the Administrative Code. Pursuant to a notice published on October 15, 2003, in the City Record, a public hearing was held on November 20, 2003, at 2 Lafayette Street, Suite 1010, New York, New York. The Board received no comments and adopted the proposed rule as final. The text of the new rule is set forth below.

*[new matter is underscored]*

§ 1-14. CITY EMPLOYEES HOLDING POLICYMAKING POSITIONS FOR  
PURPOSES OF THE FINANCIAL DISCLOSURE LAW.

For purposes of Administrative Code § 12-110(b)(3)(a)(3), a City employee shall be deemed to hold a policymaking position, and therefore be required to file a financial disclosure report, if such employee is charged with substantial policy discretion

within the meaning of Section 1-02 of Title 53 of the Rules of the City of New York.

STATUTORY AUTHORITY: Sections 2603(a) of the New York City Charter and Section 12-110(b)(3)(a)(3) of the New York City Administrative Code.

STATEMENT OF BASIS OF PURPOSE OF THE RULE:

Local Law 43 of 2003 amended the City's Financial Disclosure Law, Section 12-110 of the Administrative Code, to, among other things, add to the list of required filers those City employees holding a "policymaking position..., as defined by rule of the conflicts of interest board...." Ad. Code § 12-110(b)(3)(a)(3). In analogous provisions, the City's Conflicts of Interest Law (City Charter Chapter 68, § 2600 et seq.) imposes restrictions on the political activity of certain public servants "charged with substantial policy discretion as defined by rule of the [conflicts of interest] board...." Charter § 2604(b)(12) (prohibiting certain political fundraising by appointed public servants with substantial policy discretion) and § 2604(b)(15) (prohibiting public servants with substantial policy discretion from holding certain political party offices). "Substantial policy discretion" is defined in Board Rules § 1-02. Both the Financial Disclosure Law and the Conflicts of Interest Law thus impose certain additional responsibilities on City policymakers. No principled

reason exists for defining policymaker differently in these two laws. Furthermore, linking the policymaking position rule and the substantial policy discretion rule would ensure that all public servants with substantial policy discretion file financial disclosure reports. Such a linkage also provides a simple definition and avoids a multiplicity of rules, one for substantial policy discretion and one for policymaking position. In addition, adopting a single rule for both laws will reduce, by 50%, the burden on City agencies in identifying their employees who fall within the rules. Finally, the Board has had in place for some time a system for determining which public servants exercise substantial policy discretion, and that system has worked well.

Indeed, many ethics laws link financial disclosure filing status and restrictions on high-level public servants. For example, the New York State Ethics Commission, by rule, prohibits State officers and employees who hold “policymaking positions” from moonlighting without the approval of the Commission and ties the definition of “policymaking position” for that purpose to the definition of “policymaking position” in the State financial disclosure law. *See* 9 NYCRR § 932.1(e) (defining “policymaking position” by cross-reference to the State financial disclosure law, NYS Pub. Off. Law §§ 73-a(1)(c)(ii) and 73-a(1)(c)(iii)) and § 932.3(c) (imposing a moonlighting restriction on individuals serving in policymaking positions).

Similarly, Westchester County's Code of Ethics imposes post-employment restrictions on "reporting officers or employees," defined as those full-time County officers and employees required to file a financial disclosure statement. *See* Laws of Westchester County §§ 883.11(l), 883.21(h), 883.21(i)(3), 883.61.

It should be noted that this policymaker category of financial disclosure filers applies only to employees, not to officers, and thus not to members of boards and commissions. Such members must file financial disclosure reports under Ad. Code § 12-110(b)(3)(a)(1), but only if they are entitled to compensation. If they serve without compensation, they do not file financial disclosure reports, despite the fact that they exercise substantial policy discretion, as defined in 53 RCNY § 1-02(a).

[Financial Disclosure: FD Amendments: Policymaker rule adoption notice]