TESTIMONY
before the
NEW YORK CITY CAMPAIGN FINANCE BOARD

January 31, 2005

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My name is Mark Davies. I am the Executive Director of the NYC Conflicts of Interest Board, the ethics board for the City of New York. I have with me our Deputy Executive Director and General Counsel, Wayne Hawley. To avoid confusion with the Campaign Finance Board, I will refer to the Conflicts of Interest Board as the "COIB."

I have distributed four documents:

(1) An outline of my remarks (I have no written testimony; my oral testimony is about 8 minutes);

(2) A copy of the conflicts of interest law;

(3) A copy of the financial disclosure law;

(4) A recent COIB publication entitled "Political Activities: The Conflicts of Interest Rules."

Introduction

The Conflicts of Interest Board administers the City's conflicts of interest law, set forth in Chapter 68 of the NYC Charter, and the financial disclosure law, set forth in section 12-110 of the NYC Administrative Code. The COIB exercises jurisdiction over public servants only, not over private persons or entities.[1]

I will limit my remarks to four issues:

(1) The meaning of "business dealings with the city," as defined in Chapter 68.

(2) The Chapter 68 prohibition on a public servant, including an elected official, taking an action as a public servant that might benefit a consultant to the public servant's political campaign.

(3) The issue of public servants, including elected officials, taking an action that may benefit a major campaign contributor (the pay to play issue) and a possible amendment to Chapter 68 that would address that issue.

(4) The COIB's concern that Chapter 68 places the entire burden of complying with the conflicts of interest law upon public servants and virtually no burden upon the public, and possible amendments to Chapter 68 that would address that issue.

1. Defining "Business Dealings with the City"

The 1988 Charter Revision Commission stated, in regard to the definition of "business dealings with the City":

> "This definition is at the core of many of the chapter's prohibitions. It is intended to capture the various transactions over which agency officials exercise discretion through contracts, agreements, or through the granting of rights, privileges or advantages to individuals or firms, excepting those which involve a public servant's residence."[2]

Chapter 68 defines the phrase "business dealings with the city" as:

> "any transaction with the city involving the sale, purchase, rental, disposition or exchange of any goods, services, or property, any license, permit, grant or benefit, and any performance of or litigation with respect to any of the foregoing, but shall not include any transaction involving a public servant's residence or any ministerial matter."[3]

"Ministerial matter" is, in turn, defined as:

> "an administrative act, including the issuance of a license, permit or other permission by the city, which is carried out in a prescribed manner and which does not involve substantial personal discretion."[4]

The Chapter 68 definition of business dealings has worked well in the COIB's interpretations of those Chapter 68 provisions involving that phrase, namely:

- The prohibition on holding a position or ownership interest in a firm engaged in business dealings with the City;[5]
- The prohibition on accepting gifts from anyone engaged in, or intending to become engaged in, business dealings with the City;[6]
- The provision that permits a public servant to volunteer for a not-for-profit entity interested in business dealings with the City;[7] and
- The provision that permits a former public servant to act in a ministerial matter regarding business dealings with the City.[8]

One should note that under Chapter 68 "a public servant shall be deemed to know of a business dealing with the city if such public servant should have known of such business dealing with the city."[9]

2. Recusing as to Campaign Consultants

Perhaps the most fundamental provision of any conflicts of interest law, including Chapter 68, lies in the prohibition on using one's official position to benefit one's private interests. The New York City version of this prohibition states:

> "No public servant shall use or attempt to use his or her position as a public servant to obtain any financial gain, contract, license, privilege or other private or personal advantage, direct or indirect, for the public servant or any person or firm associated with the public servant."[10]

"Associated" is defined as:

> "A person or firm 'associated' with a public servant includes a spouse, domestic partner, child, parent or sibling; a person with whom the public servant has a business or other financial

relationship; and each firm in which the public servant has a present or potential interest."[11]

In a recent publication, "Political Activities: The Conflicts of Interest Rules – A Reminder for an Election Year," the COIB stated, in effect, that a public servant is "associated" with a paid consultant to that public servant's political campaign. I quote:

> "Because the Board has concluded that a consultant to a public servant's election campaign is "associated" with that public servant within the meaning of the City's conflicts of interest law, the public servant may not use his or her City position to benefit the consultant and accordingly must recuse himself or herself from matters involving the consultant. This means that, if the consultant also provides lobbying services or otherwise acts as a paid representative of parties appearing before the City, **the consultant may not lobby or in any other way communicate with the public servant or his or her subordinates on behalf of the consultant's private clients.** However, an elected official may vote on matters involving clients of his or her campaign consultant, provided that the elected official discloses the facts to the Board and on the official records of the body where the vote is taken."

Thus, if a public servant, including an elected official, hires a person or firm as a consultant to his or her political campaign and if that person or firm also lobbies the City, the public servant *must* recuse himself or herself in his or her City job from dealing with that lobbyist, although an elected official may vote on the matter, provided that he or she makes the required disclosure.[12] Recusal means, among other things, that the public servant must not participate in discussions regarding the matter, must not attend meetings regarding the matter, and must not receive copies of documents relevant to the matter.

3. Benefiting Major Campaign Contributors

The definition of "associated" does not expressly include those persons from whom one receives campaign contributions, even large campaign contributions; and the COIB has historically stated that a campaign contribution is not a gift within the meaning of the prohibition on

accepting gifts from anyone engaged in business dealings, or intending to engage in business dealings, with the City, although that conclusion does not appear compelled by the language of the Charter.[13]

The COIB has thus discussed, but has not yet proposed, amending the definition of "associated" to include any person or entity that was a major campaign contributor during the previous 24 months. "Major campaign contributor" could be tied either to a specific amount or to the maximum contribution permitted under the campaign finance law. Thus, pursuant to Charter § 2604(b)(3), a public servant, including an elected official, would be required to recuse himself or herself from taking any action that might benefit such a major campaign contributor, although, with appropriate disclosure, an elected official could vote on such a matter.[14]

Such an approach offers a number of advantages over restrictions on contributions to political campaigns. First, it raises no constitutional or preemption issues.[15] Second, it avoids the practical problems attendant on determining whether *every* donor does business with the City. Third, the approach under discussion by the COIB narrows the issue to whether the public servant has taken an action to benefit a major campaign contributor. This approach in no way restricts contributions – indeed, as a matter of Chapter 68, a candidate could accept a million dollar contribution – but merely requires that the candidate, if he or she wins the election, recuse himself or herself from taking any action that may benefit the contributor. To be sure, such a recusal requirement may well discourage large contributions from those who make them solely in order to curry favor with a candidate. Such a result may also encourage candidates to participate in the campaign finance program since contributors would have little incentive to contribute in excess of the recusal threshold. But both of those results are consistent with the purpose of the conflicts of interest and campaign finance laws.

4. Spreading the Burden of Compliance

It has often been said that,

> "to permit a private company, with virtual impunity, to corrupt a municipal official undercuts significantly the efficacy of the ethics law and constitutes gross unfairness to the official. Accordingly, such laws should prohibit private citizens and

companies from inducing a municipal official to violate the code of ethics."[16]

The COIB has discussed, although not yet proposed, such a provision. State law, for example, prohibits any person from offering or making a gift to a state official where it would be unlawful for the official to accept the gift.[17]

The COIB has proposed a civil forfeiture provision that would require any person, including a private individual or entity, to disgorge any ill-gotten gains that were obtained in violation of Chapter 68.[18] The COIB currently has the power to fine only public servants. Moreover, absent such a disgorgement provision, the $10,000 maximum fine permitted by Chapter 68 may prove a small price to pay for a Chapter 68 violation, which, particularly in the misuse of confidential information, could be worth far more. In addition, debarment against doing further business with the City could lie against any person, including any private individual or entity, that violated Chapter 68, including inducing any public servant to violate Chapter 68.

These provisions, while not directly on point for the campaign finance law, may point the way to possible amendments to that law that would spread to private individuals and entities some of the candidates' burdens in meeting their campaign finance obligations.

Conclusion

Thus, while the COIB expresses no views on the merits of any proposals before the Campaign Finance Board or on definitional issues faced by the CFB, we hope that the views I have expressed today will assist the CFB in struggling with these matters.

Thank you for your invitation to speak. We would be happy to answer any questions.

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[1] Where a violation of Chapter 68 involves a contract, work, business, sale, or transaction, the COIB does possess the power to void the transaction. NYC Charter § 2606(a). In addition, the COIB possesses financial disclosure jurisdiction over all candidates for City elective office, even if they are not public servants, as well as over certain political party officials. NYC Ad. Code §§ 12-110(a)(6), (b)(1)(b), (b)(2).

[2] Vol. II, Report of the New York City Charter Revision Commission, Dec. 1986-Nov. 1988, pages 150-151.

[3] NYC Charter § 2601(8). The City's financial disclosure law contains an analogous definition of "business dealings with a state or local agency": "any transaction with any state or local agency involving the sale, purchase, rental, disposition or exchange of any goods, services or property, any license, permit, grant or benefit, and any performance of or litigation with respect to any of the foregoing, but shall not include any transaction involving a public servant's residence or any ministerial matter." NYC Ad. Code § 12-110(a)(1).

[4] NYC Charter § 2601(15).

[5] NYC Charter § 2604(a). The 1988 Charter Commission indicated that this prohibition deleted the previous Charter's requirement that the interest in the firm be "substantial." "By substituting the imprecise concept of a 'substantial' investment with a bright-line rule, the commission seeks to provide public servants with clear guidance concerning the lawfulness of their activities." Vol. II, Report of the New York City Charter Revision Commission, Dec. 1986-Nov. 1988, page 169.

[6] NYC Charter § 2604(b)(5).

[7] NYC Charter § 2604(c)(6).

[8] NYC Charter § 2604(d)(7).

[9] NYC Charter § 2604(a)(6). See also Holtzman v. Oliensis, 91 N.Y.2d 488, 497, 695 N.E.2d 1104, 1108, 673 N.Y.S.2d 23, 27 (1998) ("A City official is chargeable with knowledge of those business dealings that create a conflict of interest about which the official 'should have known' (*see,* N.Y. City Charter § 2604[a][6])").

[10] NYC Charter § 2604(b)(3).

[11] NYC Charter § 2601(5).

[12] NYC Charter §§ 2601(5), 2604(b)(1)(a), 2604(b)(3). In regard to the limited exception for elected officials, the 1988 Charter Revision Commission stated: "Requiring elected officials to recuse themselves in these situations would prevent them from executing the essential functions they have been elected to perform. Disclosure only is required." Vol. II, Report of the New York City Charter Revision Commission, Dec. 1986-Nov. 1988, page 174. See COIB Ad. Op. 94-28.

[13] NYC Charter § 2601(5) (definition of "associated"). Cf. NYC Ad. Code § 12-110(d)(8)(d) (excluding campaign contributions from reportable gifts under the financial disclosure law); NYS Gen. Mun. Law § 812(5)(9) (same); NYS Pub. Off. Law § 73-a(3)(9) (same for NYS officers and employees).

[14] This approach originally appeared in a bill proposed by the New York State Temporary State Commission on Local Government Ethics in 1991 to completely revamp Article 18 (Conflicts of Interest) of the NYS General Municipal Law. See *Final Report of the Temporary State Commission on Local Government Ethics*, 21 FORDHAM URBAN LAW JOURNAL 1, 32 (1993). See also Davies, *Keeping the Faith: A Model Local Ethics Law - Content and Commentary*, 21 FORDHAM URBAN LAW JOURNAL 61, 69, 72 (1993).

[15] Cf. Holtzman v. Oliensis, 91 N.Y.2d 488, 695 N.E.2d 1104, 673 N.Y.S.2d 23 (1998) (holding that the Federal Election Campaign Act did not preempt Chapter 68).

[16] Davies, *Considering Ethics at the Local Government Level*, Chapter 7 in ETHICAL STANDARDS IN THE PUBLIC SECTOR 142-143 (American Bar Association 1999). See also Davies, *Ethics in Government and the Issue of Conflicts of Interest*, Chapter 7 in GOVERNMENT ETHICS AND LAW ENFORCEMENT: TOWARD GLOBAL GUIDELINES 97, 100, 104 (Praeger 2000); *Final Report of the Temporary State Commission on Local Government Ethics*, 21 FORDHAM URBAN LAW JOURNAL 1, 27, 34, 36-41 (§§ 802, 804, 806, 807, 808(3)-(5)) (1993); Davies, *Keeping the Faith: A Model Local Ethics Law - Content and Commentary*, 21 FORDHAM URBAN LAW JOURNAL 61, 80-81, 88-90, 95-102 (§§ 103, 106, 108-110, 111(3)-(5), 112) (1993).

[17] NYS Pub. Off. Law § 73(5).

[18] See NYC Conflicts of Interest Board, 2003 Annual Report, at 38.

[Legal: CFB Hearing Jan 2005 Testimony]

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Introduction

1. Defining "Business Dealings with the City"

2. Recusing as to Campaign Consultants

3. Benefiting Major Campaign Contributors

4. Spreading the Burden of Compliance

Conclusion

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POLITICAL ACTIVITIES: THE CONFLICTS OF INTEREST RULES

A Reminder For An Election Year

WHAT'S OK: As a general matter, you **may** volunteer to engage in political activities.

WHAT'S NOT OK: You must keep **all** political activity *out of the office.*

THIS MEANS:

1. You may **not** use City time, resources, facilities, or letterhead for your volunteer political activities. *This includes making phone calls or faxing or mailing correspondence from your City office, or receiving political calls, faxes, or mail at the office.*
2. You may **not** coerce a fellow public servant, or even ***ask*** a subordinate, to engage in political activities or to make a political contribution.
3. You may **not** use your City position to advance anyone's candidacy, including your own, for any political position. *This includes using your City title in the endorsement of a candidate.*

WHY?:

As a public servant (which means *all* City employees, officers, and officials, including members of boards and commissions), you owe your primary loyalty to the public you serve, and must not allow your personal partisan affiliations to influence your performance of your official duties. Furthermore, you must avoid creating even the appearance that the City is supporting any particular political candidate. Finally, taxpayer resources may not be used to support any particular political candidate.

HIGH-LEVEL APPOINTED OFFICIALS CHARGED WITH "SUBSTANTIAL POLICY DISCRETION":

If you are a public servant charged with substantial policy discretion, you may not ask **anyone** to make any political contribution for any candidate (including yourself) for any elective City office, or for any elected City official who is a candidate for any elective office. This restriction does not apply to elected officials. (Note: Public servants who are deemed to have "substantial policy discretion" include, but are not limited to, agency

heads, deputy agency heads, assistant agency heads, members of boards and commissions, and public servants in charge of any major office, division, bureau, or unit of an agency. Contact your agency counsel to determine if you are among those who are deemed to have substantial policy discretion.)

RUNNING FOR OFFICE: The conflicts of interest law does not prohibit a City employee from seeking elective office. However, any public servant who is a candidate must be sure to keep his or her campaign entirely separate from his or her City job. (See the general rule for political activities described above.) Further, Mayoral Directive 91-7 requires any exempt, provisional, or non-competitive City employee in a Mayoral agency who is a candidate for elective office to use accrued annual leave and/or take a leave of absence without pay during his or her candidacy, unless exempted by his or her agency head and the Mayor. In addition, the Charter forbids members of the police force from running for elective office. Finally, the federal Hatch Act bars certain City employees whose work involves a federally funded activity from seeking partisan elective office.

CAMPAIGN EMPLOYEES: City employees may volunteer to work on City election campaigns, and in fact may volunteer to work, even for compensation, on the election campaign of their City superior, provided that they comply with the above rules (no use of City time, letterhead, personnel, equipment, resources, or supplies; no solicitation of subordinates; and, for, for high-level appointed officials, no political fundraising).

CAMPAIGN CONSULTANTS: Because the Board has concluded that a consultant to a public servant's election campaign is "associated" with that public servant within the meaning of the City's conflicts of interest law, the public servant may not use his or her City position to benefit the consultant and accordingly must recuse himself or herself from matters involving the consultant. This means that, if the consultant also provides lobbying services or otherwise acts as a paid representative of parties appearing before the City, **the consultant may not lobby or in any other way communicate with the public servant or his or her subordinates on behalf of the consultant's private clients**. However, an elected official may vote on matters involving clients of his or her campaign consultant, provided that the elected official discloses the facts to the Board and on the official records of the body where the vote is taken.

OTHER RESTRICTIONS: Your agency may have stricter rules regarding political activities. Contact your agency counsel for more information.

PENALTIES: If you violate these rules, the Conflicts of Interest Board may fine you up to $10,000 per violation. So ask before you act.

WHERE TO GET ADVICE: Contact your agency counsel or the Conflicts of Interest Board. All calls to the Board are confidential, and you may call anonymously. The Board's phone number is 212-442-1400. You can also visit the Board's web site at http://nyc.gov/ethics.

OPINION SUMMARY

OPINION NO:	**2003-4**
DATE:	5/07/03
CHARTER SECTION(S) INTERPRETED:	2604(b)(2), (b)(3), (b)(5)
SUBJECT(S):	Fundraising for the City
OTHER OPINION(S) CITED:	91-10, 92-15, 92-21, 92-33, 93-15, 93-26, 94-4, 94-9, 94-12, 94-29, 95-5, 95-7, 98-14, 2000-04.

SUMMARY: It would not violate Chapter 68 for City officials to engage in untargeted solicitations, and, with the certain provisos, targeted solicitations, (1) for the benefit of the City or (2) for the benefit of a not-for-profit organization that has been pre-cleared by the Board, where the not-for-profit organization is closely affiliated with the City and where the funds raised for the not-for-profit organization are in support of the purposes and interests of the City. The Board, on a case-by-case basis, will address all other types of beneficiaries.

Specifically, it will not violate Chapter 68 for City officials to engage in direct, targeted solicitations, except to a prospective donor who the official knows or should know has a specific matter either currently pending or about to be pending before the City official or his or her agency and where it is within the legal authority or duties of the soliciting official to make, affect, or direct the outcome of the matter. If it is within the legal authority or

duties of the official to make, affect, or direct the outcome of the matter, then the official may not engage in the targeted fundraising, unless the official's agency erects a "firewall" permanently sealing the soliciting official from any involvement in making, affecting, or directing the outcome of the matter, in which case the official would be permitted to solicit from a person or firm with the pending or about to be pending matter.

Whether solicitations are targeted or untargeted, the solicitations must make clear that the donor will receive no special access to City officials or preferential treatment as a result of a donation.

In addition, each City office or agency must file a public report with the Board by May 15 and November 15 of each year disclosing (a) the name of each person or entity making a donation in the six-month period ending March 31 and September 30, (b) the type of donation received from each such person or entity, (c) the purpose of the donation, (d) the estimated aggregate value of donations received during the reporting period from each such person or entity, and (e) the cumulative total value of gifts received from each such person or entity over the past twenty-four (24) months. Monetary values of donations shall be reported as being within one of the following categories: A if it is $5000 to under $20,000, B if it is $20,000 to under $60,000, C if it is $60,000 to under $100,000, D if it is $100,000 to under $250,000, E if it is $250,000 to under $500,000, F if it is $500,000 to under $1,000,000, and G if it is $1,000,000 or more.