



CITY OF NEW YORK CONFLICTS OF INTEREST BOARD

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Testimony before the New York City Council
Committee on Standards and Ethics
Concerning Intro. 735 of 2018

Carolyn Lisa Miller
Executive Director, NYC Conflicts of Interest Board
May 2, 2018

Good morning, Chair Matteo and members of the Committee on Standards and Ethics. I am Carolyn Miller, the Executive Director of the New York City Conflicts of Interest Board, and with me is the Board's General Counsel, Ethan Carrier. We are here on behalf of COIB to offer testimony about Intro. 735.

The core mission of COIB is to educate public servants about their obligations under the City's conflicts of interest law in order to fulfill the vision set forth in Chapter 68 of the New York City Charter, the chapter entitled "Conflicts of Interest." The Preamble to Chapter 68 reminds us that "public service is a public trust" and that the purpose of a municipal conflicts of interest law is "to promote public confidence in government [and] to protect the integrity of government decision-making."

The Board's educational mission is fulfilled in part by its advisory opinions. Advisory opinions are public documents that contain anonymized versions of the confidential advice given to individual public servants – sometimes one, sometimes many – in order to shed light on how the Board interprets the provisions of Chapter 68. The Board seeks through its advisory opinions to enable public servants – through the lens of a set of specific facts and circumstances – to understand how the legal requirements of the conflicts of interest law might apply to them. Advisory opinions also lay out factors that the Board may consider in evaluating future requests for advice involving similar issues. By publicly articulating the factors the Board considers in a particular case, the Board hopes to encourage public servants to reflect on their own actions and seek advice if their own circumstances present new or different considerations.

COIB recognizes the Council's concerns about the process by which the Board reaches conclusions in its advisory opinions. Motivated by these concerns, the Council seeks to replace Section 2603(c)(4) of the City Charter with a mandate that certain advisory opinions be subject to the rulemaking process that would include, as required by the City Administrative Procedure Act, known as "CAPA," a public comment period.

COIB welcomes additional public engagement with, and public discussion about, its advisory opinions. But the Board disagrees that a CAPA-structured rulemaking process is the best way to accomplish that goal. COIB would like to offer an alternative to the current version of Intro. 735 that we hope the Council will consider, which we have provided with copies of our testimony. COIB's proposal would require that the Board have a period for public comment and a public hearing for every advisory opinion and that the Board consider those comments before issuing a final version of the opinion. COIB believes that its proposal would accomplish both the Council's stated goal of allowing for public comment on the Board's advisory opinions and the Board's goal of maintaining its capacity to utilize advisory opinions to provide guidance to all public servants on the meaning and application of the conflicts of interest law – all while preserving the Board's essential independence.

Background

The issuance of advisory opinions has been the central, if not primary, function of the City's ethics agency since its inception. In 1959, the City Council created COIB's predecessor agency, the Board of Ethics, making New York City a leader in the United States for municipal government ethics administration. The original Board of Ethics had only one power: to issue advisory opinions. In recommending the establishment of a Board of Ethics whose sole purpose would be to render public advisory opinions, the Council's Special Committee on Ethics and Standards stated in its Report:

Impartial and objective opinions rendered by a Board of Ethics, composed of outstanding citizens, will have public value. In effect, such decisions will be comparable to those rendered by the committees on ethics of professional associations. In this way, officers and employees who wish to obtain impartial and objective advice will be able to do so. No public officer or employee need be uninformed on any ethical problem.

With the passage of time, advisory opinions will furnish valuable guides, in addition to being a source of reference for all persons concerned, and will contribute to a proper understanding of the code. These opinions will reflect the practical operation of the code, and will be of value to those who must pass upon recommendations concerning its modification or amplification.

The Board of Ethics robustly fulfilled this vision, issuing 688 such opinions during its 30-year history.

During the charter revision process of 1986 through 1988, the Conflicts of Interest Board was established in its existing form, with its powers expanded in a number of important ways – most significantly, it was given the power to impose penalties for violations of the conflicts of interest law. The Board’s power to issue advisory opinions remained, with a caveat. Section 2603(c)(4), unchanged since it was amended in 1989 to become effective in 1990, gave the new Conflicts of Interest Board until September 1990 to review those 688 Board of Ethics opinions and initiate rulemaking for whichever of those opinions the new Conflicts of Interest Board determined to have interpretative value for the new conflicts of interest law. No such rulemaking took place.

Instead, the new Conflicts of Interest Board sought to quickly provide as much guidance as it could to public servants on the practical application of the statutory provisions of the revised Chapter 68. Notably, in this re-codified Chapter 68, the power to issue advisory opinions remains solely and exclusively the province of the Board itself; the staff of the Board cannot issue advisory opinions. As City Charter § 2602(g) states: “neither the counsel, nor any other officer, employee or consultant of the board shall be authorized to issue advisory opinions.” The Board remains the final arbiter of the interpretation of the law it is entrusted to administer.

Intro. 735

COIB recognizes that the Council’s primary goal in introducing this bill is to allow public comment on the Board’s advisory opinions. At the hearing of the Council Committee on Rules, Privileges, and Elections held on March 7, 2018, concerning, among other things, the re-appointment of two current members of the Conflicts of Interest Board, the Chair of this Committee, Council Member Matteo, asked the nominees a series of questions about the value and functionality of incorporating a public hearing component into the Board’s advisory opinion process.

The Board has heard and reflected upon that line of inquiry by Chair Matteo and comes before the Committee today with a proposal to implement that goal. COIB’s proposal, in contrast to Intro. 735, would allow for public comment in a way that preserves the Board’s independence – as envisioned by the City Charter – and would maintain the integrity of the tool of advisory opinions as a process separate from rulemaking.

We offer this alternative because we have four main concerns about how Intro. 735 would negatively impact the Board’s independence and ability to provide education and guidance to public servants:

First: Intro. 735 would undermine the Board’s essential independence.

Intro. 735 would require that the Board initiate rulemaking for all of its advisory opinions “which the board determines to have interpretative value in construing the provisions of this chapter” – that is, almost all advisory opinions. All City rulemaking, by statute, requires the review and approval of both the City’s Law Department and the Mayor’s Office of Operations. Thus, the Council’s bill would effectively remove from the Board its independent judgment about the interpretation and application of the conflicts of interest law and place it in the hands of

mayoral agencies. When the Board seeks to codify the confidential advice provided to individual public servants, the Law Department and the Mayor's Office of Operations would have the power to decline to certify (that is, approve) the rule.

Second: Intro. 735 would conflate two separate Board powers.

Chapter 68 of the City Charter was carefully drafted to give the new Board two distinct powers: rulemaking, as codified in Section 2603(a), and the issuance of advisory opinions, codified in Section 2603(c). The first responsibility, rulemaking, helps to implement the law; the second responsibility, the issuance of advisory opinions, explains the law that already exists. A public servant cannot be punished for "violating" an advisory opinion, because it is only a document that provides guidance about what the law already requires. If a public servant is charged by the Board with violating anything, it will be the Charter itself or a formally promulgated rule.

Third: Intro. 735 would make it harder for the Board to provide effective guidance to public servants.

Rules are a blunt instrument for educating people about their obligations under the conflicts of interest law. Rules are required by both the language of the Charter and the requirements of CAPA to be mandatory, uniform, and universally applicable. The Board's advisory opinions, generally speaking, are not that. Rather, its advisory opinions are guideposts for how the Board is thinking about the conflicts of interest law and the factors the Board is considering in applying this law to specific questions. Advisory opinions provide color and context for how a certain Charter provision or an existing Board Rule would apply in the variety of everyday situations in which real public servants find themselves. Advisory opinions help public servants understand how to comply with the law and alert them to when they might need to ask for their own individualized advice.

Fourth: The disclaimer requirement of Intro. 735 would cause City employees to miss the educational value of advisory opinions.

Intro. 735 would require for any citation to a previously issued advisory opinion of the Board a statement that the guidance of that opinion applies only to the public servant who asked for that opinion. The primary purpose of the Conflicts of Interest Board is to help public servants understand what they need to do in order to comply with, and avoid violations of, the conflicts of interest law. And those requirements should apply the same to every single public servant – whether or not he or she requested an advisory opinion from the Board. To require this limiting statement in every future advisory opinion would create the mistaken impression for future public servants that the law applies differently to the person who asked for guidance than it would to them. It would also undermine the goal of ensuring that the Board's interpretation and application of the law – both publicly and privately – is uniform and universal.

Conclusion

COIB supports the Council's efforts to implement a mechanism to allow for public comment on the Board's advisory opinions. This effort aligns with the Board's core mission of increasing public servants' engagement with and understanding of the conflicts of interest law. The Board's disagreement is with using mandatory rulemaking as the structure for that public comment because, in the Board's view, such rulemaking will ultimately undermine both the independence of the Board and the Board's ability to provide clear, comprehensive guidance to the thousands of public servants who rely on its work.

COIB believes its proposal for a revised Section 2603(c)(4), which provides for a public comment period within the advisory opinion process, is a better approach. We would welcome the opportunity to work with the Council to help craft legislation that effectively advances the goals that we share.

Proposed Alternative to Int. No. 735

A Local Law to amend the New York city charter, in relation to the advisory opinions of the conflicts of interest board

Be it enacted by the Council as follows:

Section 1. Paragraph 4 of subdivision c of section 2603 of the New York city charter is REPEALED and a new paragraph 4 is added to read as follows:

4. (a) Not later than 60 days after the issuance of an advisory opinion, the board shall publish the full text of the advisory opinion in the City Record and set a date for a public hearing on that advisory opinion no less than 30 days and no more than 60 days thereafter. The public shall have an opportunity to comment on the advisory opinion in writing in advance of the hearing and in person at the hearing. The board shall consider the public comments and either withdraw the advisory opinion or issue a final version of the advisory opinion amended as necessary within 60 days thereafter. Such final advisory opinion shall be deemed to have interpretive value in construing the provisions of this chapter. Any advisory opinion not subject to this public hearing and comment process shall be accompanied by a statement that such advisory opinion applies only to the public servant or servants on whose request it was rendered.

(b) For all advisory opinions issued prior to the effective date of this section or the first day of July, 2018, whichever is later, the board shall initiate public hearings to re-issue final versions of such advisory opinions no later than the three years from the effective date of this section or the first day of July, 2021, whichever is later.

§ 2. This local law takes effect immediately.

**THE COUNCIL
THE CITY OF NEW YORK**

Appearance Card

I intend to appear and speak on Int. No. 735 Res. No. _____

in favor in opposition

Date: 5/2/18

(PLEASE PRINT)

Name: Ethan Carrier

Address: 2 Lafayette St. Suite 1010

I represent: Conflicts of Interest Board

Address: _____

Please complete this card and return to the Sergeant-at-Arms

**THE COUNCIL
THE CITY OF NEW YORK**

Appearance Card

I intend to appear and speak on Int. No. 735 Res. No. _____

in favor in opposition

Date: 05.02.18

(PLEASE PRINT)

Name: CAROLYN MILLER

Address: 2 LAFAYETTE ST, SUITE 1010

I represent: NYC CONFLICTS OF INTEREST BOARD

Address: _____

Please complete this card and return to the Sergeant-at-Arms