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Fundraising

Charter Sections: 2604(b)(2), (b)(3), and (b)(5)

Board Rules: 1-01(a) and (h)

Opinions 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, and 2000-04.

Advisory Opinion No. 2003-4

In recent months, several elected and appointed City officials have requested opinions from the Conflicts of Interest Board (the "Board") as to whether, consistent with the conflicts of interest provisions of Chapter 68 of the City Charter, they may ask for donations from individuals and private entities, which donations would be to not-for-profit corporations for the benefit of City programs or services. More specifically, these officials request the Board's opinion as to the methods, if any, they may employ for such fundraising and from whom they may solicit funds. These requests focused the Board's attention on a variety of questions arising under earlier Board opinions regarding public servants' fundraising activities, and suggested the advisability of revisiting and clarifying some of those opinions, which we do herein.

This opinion will focus on two issues: (1) **who** may be asked for a donation, and (2) **how** they may be asked. The Board believes that there are also important issues under Chapter 68 regarding **for whom** contributions may be sought—i.e., what entities (other than the City itself) are permissible beneficiaries of public servants' fundraising activities. It is of course clear that the City itself is a permissible beneficiary. The Board also believes that public servants may raise funds for the benefit of certain not-for-profit entities closely affiliated with the City, so long as the activities of those entities for which funds are raised support the purposes and interests of the City, rather than personal interests of the soliciting public servant. In order to ensure that fundraising for such "City affiliated" not-for-profits meets that objective, the Board will accept from City agencies and offices lists of those entities and the purposes for which they propose to seek private funding, and will determine whether these submitted entities and purposes are appropriate for fundraising by public servants.[1] Where the Board so determines, City officials may fundraise in support of such entities, and for such purposes, following the guidelines outlined herein, as if such fundraising were for the City itself. However, the Board will not at this time adopt guidelines regarding what other kinds of not-for-profit entities might be permissible beneficiaries of officials' fundraising. Future questions regarding these other beneficiaries will initially be addressed on a case-by-case basis through private letter rulings and the informal advice process. Ultimately, in light of this experience, the Board would expect to issue another Advisory Opinion offering guidance concerning the beneficiaries of such activities.

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[1] The factors the Board will consider in making such determinations include, but are not limited to, the following: (1) any appearance of favoritism toward particular not-for-profit entities created by such fundraising; (2) the impact on the beneficiary organization's competitors, if any; (3) the relationship between the mission of the beneficiary organization and City programs; (4) the importance to the City of the organization's activities; (5) the extent to which the fundraising is undertaken, or appears to be undertaken, in an "official" capacity; (6) the official's personal interest in or relationship to the beneficiary organization; and (7) whether fundraising for the organization is consistent with the public servant's official duties or appears to further only personal or political interests.

I. Background

The City is currently facing a budget deficit of billions of dollars. To combat the growing deficit problem, City agencies have been asked to make a variety of budget cuts, many of which require reduction of City programs and services. In order to continue providing some of these programs and services, as well as to continue to maintain their own office facilities, officials have approached the Board with requests for opinions as to whether they may directly solicit donations to the City, or to specified not-for-profit entities for support of these endeavors. These officials seek to raise funds from both individuals and companies, some of which may have business dealings with the City and/or may be affected by City regulatory controls or be eligible for City benefits. These officials, both individually and through their respective offices, propose to engage in various forms of fundraising, including personal phone calls and mailings.

II. Relevant New York City Law and Precedent

A. Gifts to the City

Charter Section 2604(b)(5) prohibits public servants from accepting "valuable gifts" from persons or entities engaged in business dealings with the City. The Rules of the Board (Title 53, Rules of the City of New York) define "valuable gift" as any gift that has a value of $50.00 or more. See Board Rules Section 1-01(a).

The Board, however, has drawn a distinction between gifts given to individual public servants for the public servant's personal use and gifts that are given to the City itself for the enjoyment or benefit of the City and its inhabitants. In Advisory Opinion No. 92-21, the Board wrote that "the City is well served by contributions from the public which aid the City's efforts to meet the needs of its citizens. Philanthropy which takes the form of donations to the City

should be encouraged. This is especially true . . . when the City is under severe financial constraints." See Advisory Opinion No. 92-21 at pg. 2. This sentiment was reflected in the earlier opinions of this Board's predecessor, the Board of Ethics. In Board of Ethics Opinion No. 100, the Ethics Board responded to then Mayor John V. Lindsay's request to examine "the whole problem of private contributions to the City for public purposes." See Board of Ethics Opinion No. 100 at pg. 1. The Board reviewed several state and federal statutes governing the receipt of gifts and concluded, "[t]he general tenor of those statutes is to approve gifts for the public benefit." Id. at pg. 6. While not addressing the question of fundraising, the Ethics Board concluded, quite forcefully, that "[c]ontributions for public purposes should be encouraged. They reflect citizen responsibility." Id. (emphasis added). Furthermore, in Board of Ethics Opinion No. 466, the Ethics Board noted that "[i]f the making of gifts is to be encouraged, it would be altogether illogical to rule that asking for the gifts is forbidden...." Board of Ethics Opinion No. 466 at pg. 1 (emphasis added).

In Advisory Opinion No. 92-21, this Board listed several factors to be considered before a public servant may accept a gift on behalf of the City. These factors included: (1) whether the donor has business dealings with the City, (2) whether the donor has an interest in a matter awaiting determination by the agency to which the gift is directed, (3) whether the donor is a sole supplier to the agency, (4) whether the donor's contracts with the agency have been disclosed to the public, and (5) the extent to which the public servants accepting the gift on behalf of a donee agency are the same public servants who make decisions on the agency's contracts. See Advisory Opinion No. 92-21 at pg. 3. Under this approach, if, upon application of these factors, it can be found that there is no appearance that the donor could receive preferential treatment, then acceptance of the gift is permitted. The Board has nonetheless indicated that a letter should

be sent to the donor indicating that acceptance of the gift would not serve as a quid pro quo in securing any future benefits from the City. Id.

Consistent with Advisory Opinion No. 92-21, the Board has issued numerous opinions approving of "gifts to the City." See, e.g., Advisory Opinion No. 2000-04 (noting that a valid City purpose for acceptance of a block of tickets to an event may exist where, for example, the tickets are in turn given to homeless children temporarily sheltered by the City); Advisory Opinion No. 94-29 (permitting the New York City Department of Health to accept funds raised by a not-for-profit organization that has business dealings with the Department); Advisory Opinion No. 94-12 (noting that there may be occasions where it would be impracticable to return gifts to donors, such as when foreign dignitaries present gifts to City officials); Advisory Opinion No. 94-9 (determining that public servants who won prizes at conferences attended as part of their official duties could accept the prizes as gifts to the City, provided that the heads of their respective agencies determine that acceptance is in the City's interest); and Advisory Opinion No. 94-4 (permitting a high-level public servant attending a conference to accept a computer as a gift to the City from a donor that had business dealings with the public servant's agency, where donor gave a computer to 170 other attendees at the conference, provided that a letter was sent to the donor indicating that acceptance of the gift would not serve as a quid pro quo in securing any future contracts with the City). Moreover, in appropriate circumstances, Board rules permit a public servant to accept travel expenses from private entities as a "gift to the City." See Board Rules Section 1-01(h).

Generally, the Board has viewed the acceptance of "gifts to the City" favorably if the acceptance of the gift does not create an appearance that the donor will receive preferential treatment. However, such gifts have not been permitted where acceptance may create the

appearance that the impartiality of an agency's employees is compromised, such as where the donor is engaged in business negotiations with the donee agency. See Advisory Opinion No. 92-33.

Advisory Opinion No. 92-21 also involved, in part, targeted solicitation of gifts from City vendors by the donee agency. The Board approved such solicitations without expressly considering the "coercion" issue discussed below with regard to charitable fundraising. A year later, however, in Advisory Opinion No. 93-15, on the topic of charitable fundraising, the Board noted that targeted solicitation of City vendors raised such concerns even where the solicitation was for the City itself. See Advisory Opinion No. 93-15, at fn. 5.

In the past, primarily to avoid the coercion issues raised by certain forms of solicitation, both the Board and its predecessor recommended, as an alternative to solicitation and acceptance of gifts to the City, the formation of not-for-profit corporations with the express purpose of raising funds for City purposes. See, e.g., Board of Ethics Opinion No. 100 at pg. 10; Advisory Opinion No. 92-21 at pg. 6; and Advisory Opinion No. 94-29 at pg. 4. It was thought that, by using these organizations and their employees (who presumably would not be City officials) for fundraising activities, the City might reap the benefits of receiving donations while facing "fewer ethical problems" than when City officials themselves actively solicit contributions. See Advisory Opinion No. 92-21 at pg. 6.

B. Charitable Fundraising

Charter Section 2604(b)(3) prohibits a public servant from either using or attempting "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." "Associated," as defined by Charter Section 2601(5),

"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." Thus, Charter Section 2604(b)(3) would prohibit an official from using his or her City position or title to raise funds for any person or entity, either for-profit or charitable, with which he or she is associated. See, e.g., Advisory Opinion No. 95-5 (finding that it would be a violation of Charter Section 2604(b)(3) for a public servant, who was a member of a fraternal association by virtue of his City position, to solicit discounts for the association's membership, inasmuch as such discounts were for the benefit of, among others, the public servant).

Fundraising by public servants may still create a risk of violating Chapter 68, even where the public servant is not associated with the person or entity for which he or she is fundraising. Charter Section 2604(b)(2) prohibits a public servant "from engaging in any business, transaction or private employment, or having any financial or other private interest, direct or indirect, which is in conflict with the proper discharge of his or her official duties." Thus, in Advisory Opinion No. 91-10, the Board determined that charitable solicitations by public officials could violate Charter Section 2604(b)(2) if the solicitation process "is perceived to be coercive or provides an inappropriate opportunity for access to such official." The Board's concern was that the solicited person or entity would inevitably feel coerced to contribute by a belief or appearance that official City decisions affecting that person or entity might be influenced by whether or not a contribution was made. By the same token, there could be a public perception that, by virtue of the solicitee's access to the public official, official conduct would be influenced positively or negatively, depending on the response to the solicitation. See, generally, Advisory Opinion No. 91-10; see also Advisory Opinion No. 98-14, at pg. 2 (finding

that an elected official's proposed letters on her official letterhead requesting that local merchants and individuals donate to a not-for-profit organization would "create the appearance the elected official is pressuring others to provide financial support to" that organization).

With these concerns in mind, the Board drew a distinction in Advisory Opinion No. 91-10 between permissible "passive" solicitation of funds, such as being an honoree at a fundraising event or having one's name listed on invitations or other communications concerning such an event, and impermissible "active" solicitation of funds, such as making personal calls or sending personal letters to potential donors. See Advisory Opinion No. 91-10 at pg. 3, citing with favor Board of Ethics Opinion No. 688; see also Advisory Opinion No. 93-15. Thus, Advisory Opinion No. 91-10 generally permitted elected officials to engage only in "passive" fundraising on behalf of charities.

In Advisory Opinion No. 91-10, the Board also drew a distinction between elected and appointed officials, ruling that it would *not* violate Chapter 68 for certain high-level *appointed* officials to take an *active* role in fundraising, so long as any solicitations were not directed to persons or firms likely to come before the officials' agencies or to be affected by their official actions. That limitation on active fundraising was deemed necessary to avoid the appearance of impropriety, any "implication that the officials are obtaining any direct or indirect personal benefits," and any "perception that their City offices are being misused as 'a lure or pressure.'" See Advisory Opinion No. 91-10 at pg. 5.

In an effort to minimize uncertainty in applying the principles set out in Opinion 91-10, the Board in Advisory Opinion No. 93-15 reaffirmed the active/passive distinction and provided "further clarification as to the meaning of 'active' fundraising." It noted that "active" fundraising "cannot be defined by simply asking whether or not a public servant took any action

whatsoever which resulted, or could result, in contributions being made to a not-for-profit organization. Under such an approach, virtually any role in a fundraising campaign could be characterized as 'active,' and would therefore be prohibited under Chapter 68." See Advisory Opinion No. 93-15 at pg. 8.

Rather, "active" fundraising was described in Opinion 93-15 as activities that

> could easily create a perception, in the eyes of solicitees and of the public at large, that those who seek to do business with the official are expected, or would be well-advised, to make a contribution in order to secure access or favorable treatment. Such a perception could seriously undermine the public's confidence in the fairness and impartiality of its elected officials, and is therefore prohibited under Section 2604(b)(2) of the City Charter, which provides that:
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> No public servant shall engage in any business, transaction or private employment, or have any financial or other private interest, direct or indirect, which is in conflict with the proper discharge of his or her official duties.[2]

Accordingly the Board determined in Advisory Opinion No. 93-15 that it would be prohibited "active" fundraising for a City Council Member to solicit contributions from local merchants in the Member's district for the purpose of beautifying public parks or repairing potholes on a City street. The Board noted that by soliciting the local merchants, the Council Member was impermissibly "targeting" a group that was likely to have business dealings with the Member. See Advisory Opinion No. 93-15 at pg. 8. In contrast, the Board permitted the Council Member to include a fundraising appeal in newsletters sent out to the public at large, "which may or

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[2] In a footnote, the Board noted that "Charter Section 2604(b)(2) was intended to give the Board the flexibility to handle situations which present actual or potential conflicts of interest, but which were not covered by other provisions in Chapter 68. See Report of the New York City Charter Revision Commission, December 1986-November 1988, page 175." See Advisory Opinion No. 93-15, at pg. 5, n.1.

may not include persons or firms likely to seek access to the Member or to City government." In that instance, the Board ruled, the Member was engaged in general and permissible "untargeted" solicitation. Id. at pg. 9. In approving such "untargeted" solicitations, the Board indicated that "a solicitation of this type is not generally perceived as being coercive, or as suggesting that a contributor would enjoy some special status if he or she decides to follow the Council Member's suggestion." Id.

In Advisory Opinion No. 93-15, the Board went on to explain that general solicitations, such as erecting signs or publishing requests in the Council Member's newsletter, would be acceptable "passive" fundraising, even if such requests were for contributions to specific not-for-profit entities. Id. at pg. 11. The Board noted that, in determining whether a public official is participating in prohibited "active" fundraising, "the principal concern is whether or not the public servant's actions would create an appearance that he or she is using the power of public office to pressure others into contributing, taking official action on the basis of whether or not a contribution has been made, or allowing contributors to have access to City government in a manner not enjoyed by the general public." See Advisory Opinion No. 93-15 at pg. 8 citing, with favor, Advisory Opinion 91-10; see also Advisory Opinion No. 98-14 at pg. 3 (encouraging the use of letters sent to not-for-profit organizations "attesting to the good works of the particular organization, or offering other positive . . .comment . . .[which] the not-for-profit organization may thereafter reprint or publish . . ."); but see Advisory Opinion No. 92-15 (finding that an agency head could not serve on the honorary committee for an annual benefit of a not-for-profit organization that had a contract with her agency, where the combination of her fundraising role with her City role in approving and supervising the contract may create an appearance that the not-for-profit is receiving preferential treatment) and Advisory Opinion No. 95-7 (prohibiting a

high-level public servant from selling tickets to fundraising events for a not-for-profit organization on the board of which he served).

Later that same year, in Advisory Opinion No. 93-26, the Board determined, consistent with Advisory Opinion Nos. 91-10 and 93-15, that it would be a conflict of interest for the Brooklyn District Attorney *personally* to solicit funds for a private not-for-profit entity that was created for the express purpose of supporting the mission of the DA's office. In that case, however, the Board determined that *staff* of the Brooklyn DA's office would be permitted to engage in active fundraising for the same not-for-profit, provided that DA's staff did not solicit persons or firms likely to come before or engage in business dealings with the DA's office; that their solicitations were free from any indication that contributors would obtain personal benefits; and that the staff members did not appear to be using their positions as a lure or pressure. As further insulation against the appearance of coercion, the Board ruled that any written solicitations should include language expressly stating that contributions would not affect any future business dealings or the disposition of other matters between the DA's office and the contributor.

III. The Law in Other Jurisdictions

A. New York State Ethics Commission (the "Commission") Decisions[3]

The Commission, like the Board, has generally permitted the acceptance of gifts to the

[3] The State provision that is the parallel to City Charter Sections 2604(b)(2) and (b)(3) is considerably broader in its prohibitions. In part, the State law provides that "[n]o officer or employee of a state agency . . . should have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature, which is in substantial conflict with the discharge of his official duties in the public interest." See New York State Public Officers Law Section 74(2) (emphasis added). As an ethics code, rather than a pure conflicts of interest statute, the State law contains specific provisos regarding appearances of impropriety, such as "[a]n officer or employee of a state agency. . . should endeavor to pursue a course of conduct which will not raise suspicion among the public that he is likely to be engaged in acts that are in violation of his trust." See New York Public Officers Law Section 74(3)(h) (emphasis added).

State, again provided that the acceptance would not result in an appearance that the donor was receiving "special" treatment. In many of the Commission's opinions, in order to determine whether the gift resulted in an appearance that the donor was trying to obtain a benefit from the State agency, the Commission looked to the donor's relationship to that agency (i.e., whether the donor was regulated by the agency or whether the donor had a contract or litigation with the agency). See, e.g., Commission Advisory Opinion No. 92-1 (concluding that the State Department of Agriculture and Markets [the "Department"] could accept contributions for one of the Department's programs, but only from individuals and entities not under Department investigation or involved in litigation with the Department); Commission Advisory Opinion No. 95-38 (concluding that State Department of Environmental Conservation ["DEC"] could accept donations only from those not under investigation by the DEC or involved in litigation with the DEC); Commission Advisory Opinion No. 97-6 (concluding that the State Consumer Protection Board may not accept donations from anyone subject to proceedings of the Public Service Commission and that it must consider the source, amount, and timing of each donation); and Commission Advisory Opinion No. 97-10 (concluding that the State Office of Mental Retardation and Developmental Disabilities may not accept financial support from its vendors).

The Commission has determined that in certain circumstances State employees may *actively* solicit funds for charitable organizations, provided that the employee is receiving no personal benefit from such solicitations and, again, that the solicitations do not result in an appearance that the donor will receive preferential treatment from any State agency. See, e.g., NY State Ethics Commission Advisory Opinion No. 97-28 (determining that an employee of the Department of Environmental Conservation could, with certain provisos, solicit funds for charitable organizations). In order to address the concerns of favoritism and coercion, yet permit

solicitations, the Commission, in its Advisory Opinion No. 97-28, determined that a State employee could, acting in personal capacity, raise funds for charity, but could not solicit from those businesses or individuals which (1) had open cases at the employee's State agency in which the employee was involved or (2) had cases at the State agency within the last twelve months in which the employee was involved. See Commission Advisory Opinion No. 97-28, pg. 3. The Commission further determined that the State employee must recuse himself at his State agency, for a period of one year, from matters involving anyone from whom he has accepted a contribution.

B. Decisions of Other States

A review of numerous decisions from jurisdictions across the country reveals that most states permit not only the acceptance of gifts to government, but also solicitation of such gifts by public officials. Provided that the public servant receives no personal benefit from the solicitation, and provided that there is some public purpose, most, if not all, jurisdictions focus primarily on avoiding coercion. In order to strike a balance that would permit fundraising, but avoid the potential of coercion, many states prohibit soliciting from (1) any person or entity doing business with the government official or agency in question, and (2) any person or individual regulated by the government official or agency in question. See, e.g., Louisiana Board of Ethics Advisory Opinion No. 1999-992 (permitting public servants to solicit sponsorships and donations for a private not-for-profit organization, provided that the donors (1) are not seeking to obtain business with the state agency, (2) are not seeking to influence legislation (e.g., lobbyists), (3) are not regulated by the public servant's agency, and (4) do not have economic interests which may be affected by the public servant's official job duties); Florida Ethics Commission CEO Opinion 91-52 (permitting city councilwoman to solicit funds

for not-for-profit organization interested in establishing bird sanctuary in a city park, provided that solicitation is made with understanding that official action or judgment will not be influenced); Rhode Island Ethics Commission Advisory Opinion No. 98-155 (permitting solicitation by employees of the Providence Housing Authority of Authority vendors on behalf of a not-for-profit controlled by the Authority, inasmuch as solicitations do not benefit the requestors personally and there is no appearance that donors would receive unfair advantage); and Alabama Ethics Commission Advisory Opinion No. 96-101 (permitting police officers to solicit for funds and items for children's Christmas party held by a not-for-profit organization, provided that donor is not a lobbyist or a vendor to the State Capitol police or a person or business directly inspected, regulated, or supervised by the police).

The Hawaii State Ethics Commission, in particular, has noted that the responsibilities of *elected* officials could encompass officially supporting local charities, holding that it is not a misuse of position "when a legislator uses his or her position for a legitimate state purpose, such as to assist charities that benefit one's constituency or the State as a whole." See Hawaii State Ethics Commission Informal Advisory Opinion No. 99-4 at pg. 2.

C. Federal Law

Officers or employees of the executive, legislative, and judicial branch may not solicit or accept anything of value from a person "seeking official action from, doing business with, or (in the case of executive branch officers and employees) conducting activities regulated by, the individual's employing entity or . . . whose interests may be substantially affected by the performance or nonperformance of the individual's official duties." See 5 USC Section 7353. Federal law, however, permits each "supervising ethics office" to issue rules and regulations regarding the implementation of 5 USC Section 7353 and, where appropriate, to provide for

reasonable exceptions. See 5 USC Section 7353(b)(1).

The "supervising ethics office" in the House of Representatives is the House Committee on Standards of Official Conduct (the "House Committee") and in the Senate, the Senate Select Committee on Ethics (the "Senate Committee"). Both of these Committees have generally interpreted the Federal law in regard to fundraising to allow solicitations on behalf of not-for-profit organizations. See, e.g., House Committee, April 4, 1995, Memorandum for All Members, Officers and Employees (permitting solicitation on behalf of charities qualified under Section 170(c) of the Internal Revenue Code (which includes 501(c) charities), provided that no official resources are used, no official endorsement is implied, e.g., no use of official letterhead, and there is no direct personal benefit to the requestor); Senate Committee Interpretive Ruling No. 438 (noting that, according to its legislative history, 5 USC Section 7353 applied "only to those gifts solicited by or given to a covered person" and concluding that "the range of activity intended to be proscribed by Section 7353 is only the solicitation and acceptance of gifts which were directly or indirectly for the federal employee soliciting the gift. Since charitable contributions . . . do not come within this general area, they are not covered by [the] prohibition on solicitation or acceptance of gifts").

IV. Discussion

While gifts to the City are especially welcomed, especially in difficult fiscal times, the Board continues to believe that, unless precautions are taken, solicitation of private sector persons or entities by both elected and appointed public officials to make gifts to the City, or to not-for-profit entities directly affiliated with or directly supporting City agencies or activities,

raises serious concerns under Chapter 68.[4] Where a public official actively solicits such gifts, the danger is twofold. First, there remains the appearance that donors will receive preferential treatment from the City. Second, an element of coercion is introduced by the act of solicitation: when a high-ranking City official makes a personal and direct request for money, goods, or services, the prospective donor may fear that a refusal risks retaliatory action by the official, and/or may conversely believe that a contribution will yield special treatment from, or access to, the official.

The City's procurement process relies upon an open, arms-length, competitive system. See Title 9 of the Rules of the City of New York (Procurement Policy Board Rules). Any appearance of favoritism strikes at the very heart of the City's procurement rules, which strive to create an even ground where City vendors are chosen solely based on established neutral criteria. Id. Where a public servant solicits and accepts a gift to the City or a charity from a current or prospective City vendor, that may create an appearance that this vendor will receive preferential treatment, in which case Charter Section 2604(b)(2), which prohibits public servants from acting in conflict with the proper discharge of their official duties, may be violated. The same dynamic is in play beyond the procurement process, if the solicited persons and entities are subject to City regulation, or eligible for specific City benefits. In all three relationships – procurement, regulation, and City benefits – the process shares the evils attendant on the justly-criticized "pay to play" system of political contributions.

A review of Board precedent, as well as decisions from New York State, from other states, and from the federal government, indicates that donations to the government are generally

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[4] It should be noted that the focus of this Advisory Opinion is on solicitation of gifts *from the private sector*. Donations of goods or services from other public sector entities – e.g., free consulting or training programs provided to City agencies by the City University – present no Chapter 68 problems.

favored. In addition, with some qualifications, solicitations on behalf of the government and charities have been generally permitted, so long as they are unmarred by personal economic gain to the solicitor. But the Board, like other jurisdictions across the nation, has struggled to strike a balance between permitting public officials to use their offices for public good by raising funds for public benefit, and the potential appearance of impropriety created when high-ranking officials directly solicit individuals and entities for funds. Thus, two concerns have predominated in discussions and decisions regarding such solicitations, not only by elected officials but by all public servants: first, whether there is an appearance of coercion in the solicitation and, second, whether there is an appearance that the donor will receive preferential treatment, or undue access to the public official, if a gift is given. These two concerns may, in turn, be analyzed in terms of (1) the targeted or untargeted nature of the solicitation, and (2) the relationship of the donor to the City.

A. Targeted vs. Untargeted Solicitations

While the Board views its previous distinction between "active" and "passive" fundraising as a useful precedent, it now abandons that distinction in favor of a bright line distinction between "targeted" solicitations and "untargeted" solicitations. Where solicitations are not targeted to specific potential donors, there is less danger that any particular person or entity will receive, or be perceived to receive, preferential treatment as a result of a donation. Since no specific individual or business is approached – i.e., all similarly situated individuals or businesses receive the same general request (e.g., through a mass mailing) and are given the same opportunity to donate or decline – the appearance is avoided that any particular individual or entity will receive preferential treatment. The distinction turns not on the "active" nature of the solicitation, but upon the potentially coercive nature of personal, direct solicitations.

Arguably, a plea for funds by a public official in a thirty-second television advertisement could be deemed "active"; however, since it is not directed at any particular individual or entity, the danger of coercion is virtually nil.

"Targeted" solicitations consist of one-on-one phone calls, meetings, and personal letters directed to potential donors. Targeted solicitations may be identified either by the method of the solicitation (e.g., direct phone calls), by the content of the solicitation, or by the criteria used to identify the recipients of the solicitation. For example, a personal letter that makes clear from its contents that it is being directed specifically to the prospective donor would be a *targeted* solicitation. Likewise, a "Dear Friend" letter directed solely to vendors to the public servant's agency would also be a targeted solicitation.

On the other hand, an individually-addressed letter that makes clear by its terms that the solicitation is in fact part of a mass mailing, will be considered *untargeted,* provided that the list of recipients was determined by criteria that were not designed to reach only "Prohibited Targets," as defined below. "Untargeted" solicitations would also encompass mass mailings not individually addressed, flyers, public service advertisements, newsletters, speeches, press conferences, TV and radio interviews, and the like, which are directed to the public, or to large groups of potential donees generally. See, generally, Advisory Opinion No. 93-15.

Existing Board precedent permits elected officials to engage in certain untargeted fundraising on behalf of charities and also permits certain high-level appointed officials to engage in active fundraising, provided that solicitations are not made to persons or entities likely to be doing business with or subject to regulation by the official's agency. See Advisory Opinion Nos. 91-10 and 93-15. The Board now rules that all *untargeted* solicitations by elected officials and *all* appointed public servants are permitted, so long as it is made clear to potential

donors in each solicitation that any contributions will not affect any future business dealings or the disposition of other matters between the official's office and the contributor. The Board is satisfied that such untargeted solicitations, even by elected or high-level appointed officials, do not carry a high risk of coercion, and that any such risk is outweighed by the public benefit derived from permitting such solicitations.[5]

B. Targeted Solicitations

It would be simple to draw the bright line between untargeted solicitations (permitted) and targeted solicitations (prohibited) and stop there. Nevertheless, the Board is mindful that many elected and appointed officials perceive that directly approaching sources of alternate funding for the benefit of the public is as much a part of their official City responsibilities as determining how tax revenues are spent or where spending cuts should be made. These officials argue that not only is raising funds for the public benefit *not* in conflict with the proper discharge of their official duties, but is actually an integral part of such duties. Indeed, particularly in the area of education, there are statutorily-authorized programs that either encourage or *require* City officials to solicit private sector contributions. Equally persuasively, both elected and appointed officials argue that, in many instances, direct, targeted fundraising by elected and senior appointed officials is the *most effective* means of fulfilling those responsibilities, because likely donors find it easy to ignore both non-targeted appeals and targeted solicitations from low-level officials.

Notwithstanding these valid arguments, it remains the Board's view that targeted appeals by public officials are effective precisely *because* they are inherently coercive. Thus, the Board

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[5] As discussed in the next section, however, the Board does not consider direct "follow-up" communications with potential donors who respond to such "untargeted" appeals to be equally harmless and still in the category of "untargeted" solicitations. Such communications are dealt with as "targeted" solicitations. (See p. 21 below.)

continues to believe that, however critical the need for private sector support, in order for elected and appointed officials to engage in targeted fundraising, safeguards must be put in place to minimize the likelihood of coercion and the appearance that the donor may receive inappropriate access or other preferential treatment as a result of the donation.

In order to achieve a balance between permitting effective fundraising and avoiding coercion and the appearance of impropriety, the Board adopts the following approach. City officials, including elected and appointed officials, may engage in direct, targeted solicitations, ***except from*** 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, where it is within the legal authority or the duties of the soliciting official to make, affect, or direct the outcome of the matter. Such "specific matters" would include all phases of the procurement process for vendors to City agencies, all regulation and enforcement proceedings, and all applications to receive benefits administered by the official's agency. The key factor is that the soliciting official should have no actual involvement in, or legal authority over, a pending or about to be pending matter involving the prospective donor. Although the Board considered identifying specific "prohibited targets" for various City offices and agencies, in the end it determined to trust in the judgment and discretion of public servants to recognize those potential donors who should not be targeted for solicitation, and to seek guidance from the Board when in doubt. A "safe harbor" alternative would be for an agency to erect "firewalls" permanently sealing the soliciting official from any involvement in making, affecting, or directing the outcome of the matter, thus permitting the official to solicit from a person or firm with a pending or about to be pending matter.

The Board also considered how to treat "follow-up" communications with potential donors who have received "untargeted" solicitations, or who, absent any solicitation, express an interest in contributing, but wish to obtain further information, or explore various ways in which they might provide support in response to the solicitation. The Board believes that any such communications between such individual prospective donors and elected or appointed officials carry the same risks of coercion, appearance of favoritism, and undue access as would "targeted solicitations" to the same donor. Accordingly, public officials may not personally pursue communications with such potential donors if targeted solicitation of them would be prohibited – i.e., if they have currently pending or about to be pending matters before the official or her/his agency, where it is within the legal authority or the duties of the soliciting official to make, affect, or direct the outcome of the matter. However, such officials should be permitted (even if there are no "firewalls") to have an initial conversation, in response to an approach by such a potential donor, at which time the official may thank the prospective donor for the expression of interest, and direct him or her to an appropriate person who may engage in further detailed discussions – i.e., either (a) an employee (perhaps one specifically designated for the purpose of such follow-up solicitations) who has no authority to determine, affect, or direct the outcome of any agency action affecting the potential donor, or (b) an employee of the not-for-profit entity that is to be the recipient of the donation.

For purposes of these restrictions, the "agency" of an elected official except the Mayor and members of the Council, but including the Public Advocate, Comptroller, Borough Presidents, and District Attorneys, is his or her office. For the Mayor, it is the Executive Branch of City government, as defined in Charter Section 2604(d)(3), and for members of the Council, it is the Legislative Branch. Public servants remain free to engage in *untargeted* solicitations

through speeches, press conferences, interviews, and mass mailings. **In all cases, however, both untargeted or targeted, solicitations must make clear that the donor will receive no special access to City officials or preferential treatment as a result of a donation.**

C. Public Disclosure of Donations

As an additional safeguard, all City offices and agencies (including, without limitation, those of all elected officials) will be required to publicly disclose twice a year all donations received by them to either the City or to a not-for-profit entity affiliated with that office or agency, which exceed $5,000 in aggregate value from a single donor.[6] More particularly, each office or agency must file a public report with the Board by May 15 and November 15 of each year (commencing November 15, 2003), disclosing (a) the name of each person or entity making a donation in the six-month period ending March 31 and September 30 respectively, (b) the type of donation received from each such person or entity (i.e., money, goods, or services), (c) the purpose of the donation (e.g., renovation of Gracie Mansion), (d) the estimated value of all 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.[7] If the agency is unable reasonably to estimate the value of a donation of goods or services, then the agency may describe the goods or services with sufficient particularity to

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[6] See Arkansas Code Section 21-8-804(c) (requiring that public officials accepting gifts, grants, or donations of money, disclose, on a quarterly basis to the Arkansas Ethics Commission (1) the gift, grant, or donation received, (2) the person donating the gift, grant, or donation of money, and (3) the estimated value of the gift, grant, or donation. See also, Municipal Code of Chicago Section 2-156-040(f) (requiring gifts to the City be reported to the Board of Ethics and the Comptroller, who will then "add [the gift] to the inventory of City property").

[7] The Board considered, but upon deliberation rejected, a requirement that officials disclose the identity of all persons and firms *solicited* for contributions in targeted appeals, whether or not a donation was received. Such a requirement might ensure that parties were not disfavored by their declination to contribute. On the other hand, listing those who fail to give could well be seen as overwhelmingly coercive, as well as, in some cases, unfairly embarrassing.

enable readers of the disclosure statement to make a judgment as to the value of the gift. Monetary values 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.

The Board recognizes that certain larger agencies (e.g., the Department of Education) may encounter considerable administrative or other difficulties collecting data on, and disclosing, donations of relatively small magnitude solicited and received not by the central office, but by officials in local offices or schools. In such cases, the Board would anticipate acting favorably on requests for *partial* waiver or modification of the disclosure requirement with respect to such small donations under terms and conditions otherwise consistent with this Opinion. The Board also recognizes that there may be situations in which security, public safety, or confidentiality concerns may preclude such disclosure of certain donations, and the Board will entertain requests for waiver of the disclosure requirements when such situations arise.

V. Board Decision

It would not be a violation of Chapter 68 for the City officials whose requests for advice prompted this Advisory Opinion to solicit donations for the purposes indicated in their requests, so long as such solicitations are conducted in conformity with the requirements and procedures set forth above.

To the extent that this opinion is inconsistent with any past Board opinions, those opinions are superseded.[8]

Steven B. Rosenfeld
Chair

Angela Mariana Freyre

Bruce A. Green

Jane W. Parver

Benito Romano

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[8] As noted at the outset of this Opinion, the Board expects, for the present, to consider questions regarding the permissible beneficiaries of fundraising by public servants (other than the City itself and City affiliated not-for-profits "pre-cleared" by the Board) on a case-by-case basis through requests for private letter opinions or informal advice.