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**SUMMARY:** Elected officials and agency heads, and their designees, may in their official capacities, using City time and resources, solicit and otherwise encourage private contributions to not-for-profit organizations, after a personal determination by the elected official or agency head that the not-for-profit's work supports the mission of his or her City office or agency. Such solicitations must include a statement that a decision whether or not to give will not result in official favor or disfavor. But such public servants may not target for these solicitations any person or firm with a matter pending or about to be pending before their City office or agency, and they may take no such action on behalf of any organization with which they are associated or that would benefit a person or firm with whom or which they are associated. Each City office or agency must file a public report with the Board by May 15 and November 15 of each year disclosing the identity of each not-for-profit organization for which the office or agency sought private contributions in the six-month period ending March 31 and September 30, respectively.

### Advisory Opinion No. 2008-6

In Advisory Opinion No. 2003-4 the Board addressed the question of fundraising by City officials for the City itself and for not-for-profit entities closely affiliated with City offices and agencies. But the Board reserved the question of "what *other* kinds of not-for-profit entities might be permissible beneficiaries of officials' fundraising" (*id.* at 2 (emphasis added)), preferring to consider that question on a "case-by-case basis," leading to a possible future advisory opinion based on its experience with those cases. On the

basis of its experience in the intervening five years, the Board now issues that anticipated opinion.

### Background

In Advisory Opinions preceding No. 2003-4, the Board did give some consideration to fundraising by public officials in their official capacities for charitable entities that were not affiliated with the City.<sup>1</sup> In Advisory Opinion No. 91-10 the Board observed that

“[i]t is surely in the City's interest to encourage the voluntary financial support of community groups, educational institutions and charities, inasmuch as their good works help to sustain the life of the City and indeed are indispensable to it.” (*Id.* at 2.)

The Board noted, however, that official fundraising for such entities could create “an appearance of impropriety” if the official’s action is “perceived to be coercive or provides an inappropriate opportunity for access to such official.” *Id.* Such an appearance would implicate Charter Section 2604(b)(2), which forbids public servants from engaging in any transaction, or having any private interest, that is in conflict with the proper discharge of their official duties. In order to allay concern for the potential of coercion if elected and high-ranking appointed officials were given full rein to solicit charitable contributions, the Board in Opinion No. 91-10 adopted a distinction between “active” and “passive” fundraising, ruling 1) that elected officials could engage only in passive fundraising (*e.g.*, serving on honorary committees for charitable events),

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<sup>1</sup> Those opinions did not address fundraising by public servants in their *personal* capacities, such as fundraising for their alma maters, their places of worship, or their block associations. Nevertheless, even such personal charitable activity, like other private activity, may be restricted by Chapter 68. For example, public servants may not use City time or resources for such personal fundraising; nor may they direct solicitations to those who have matters before them at their City agencies. *See COIB v. King*, COIB Case No. 98-508 (2001). Like those earlier opinions, this opinion will instead address charitable fundraising by City officials in their *official* capacities.

but not in active fundraising, and 2) that high-ranking appointed officials could engage in active fundraising, but only so long as they did not direct their solicitations to those likely to have matters before their City agency.

The “coercion” concern also underlay Advisory Opinion No. 93-15, in which the Board attempted to clarify the distinction between active and passive fundraising. Observing that not all actions that might result in contributions to a charity would be deemed “active,” the Board found the relevant question to be whether “the public servant’s actions would create an appearance that he or she is using the power of public office” to pressure or coerce others to make contributions, or to afford greater access to government to those who made contributions. *Id.* at 8-9.

In its pre-2003 rulings on official fundraising for charitable entities not affiliated with the City, the Board also expressed a concern regarding the appearance of official “endorsement” of favored beneficiaries over other worthwhile charities competing for scarce philanthropic resources. In Advisory Opinion No. 92-15, for example, the Board determined that an agency head could not serve on the honorary committee for the annual benefit of a not-for-profit entity that had a contract with her agency, ruling that “the combination of her fundraising role with her role in approving and supervising the contract may create an appearance that the not-for-profit entity *is receiving preferential treatment.*” Opinion No. 92-15 at 1 (emphasis added).

In Opinion No. 2003-4, as noted above, the Board considered in considerable depth City officials’ solicitation of private support for the City itself and for not-for-profit organizations closely affiliated with City offices and agencies. In that opinion, the Board abandoned the distinction between “active” and “passive” fundraising, in favor of a bright line distinction

between “targeted” and “untargeted” solicitations – the former consisting of direct appeals such as one-on-one phone calls, meetings, and personal letters to potential donors, the latter of such devices as mass mailings not directed to specific potential donors. *Id.* at 17. In holding that all *untargeted* fundraising for the City and its affiliated not-for-profits would be permitted, the Board again evinced its concern over the “coercion” factor:

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. (*Id.* at 17-18.)

In addition, the Board also determined that targeted solicitations for the City and its affiliates would be permissible, provided that no official could solicit any person or firm with a matter “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.” *Id.* at 20. In the case of both targeted and untargeted solicitations, the Board required that the solicitation must make clear that the decision whether or not to give would result in no official favor or disfavor for the person or entity solicited, and would yield no special access to the official or his or her agency. Finally, the Board required City agencies and offices to report every six months all gifts in excess of \$5,000 in aggregate value from a single donor. *Id.* at 22.

Because Advisory Opinion No. 2003-4 addressed fundraising only for the City itself or for not-for-profits determined to be closely affiliated with the City, the concern regarding

possible “endorsement” of particular charities was not present. The Board recognized, however, that when it turned to official fundraising on behalf of not-for-profit entities that are *not* affiliated with the City, both the coercion and the endorsement concerns would again be implicated.

As anticipated in Opinion No. 2003-4, the Board has, over the past several years, received numerous requests for advice from public servants regarding proposed official fundraising efforts on behalf of charitable entities that could not be considered to be “affiliated” with the City. A sampling of those requests is as follows:

1. An elected official with citywide responsibilities sought to become co-chair of a specific fundraising program for a national not-for-profit organization with a national agenda, and in that capacity to use his City position to solicit funds for that program. The specific program was one that, the elected official determined, would support a major initiative of the official’s City office.
2. Another elected official proposed to participate in his official capacity at a public fundraising event in the City to “kick off” a major fundraising initiative by a charity with a statewide mission. The beneficiaries of the charity’s services included many thousands of residents of the City and of the area served by the elected official.
3. An agency head who sat on the board of directors of a not-for-profit organization dedicated to finding a cure and better treatment for a particular disease – a cause not significantly related to the work of the City agency headed by the official – asked whether it was permissible to raise money for the organization so long as no vendors or contractors of the agency were solicited.

4. Another agency head asked whether he, and two of his deputies, could solicit funds for a national not-for-profit that he had been instrumental in forming, the purpose of which was to engender, on a national level, federal and state policies and funding supportive of initiatives adopted by the official's own City agency. The agency head served on the organization's board, service that he believed was part of his City job.
5. A third agency head asked whether he could consent to the request of his alma mater to begin raising funds for a campus building to be named in his honor; the request did not contemplate that the City official would himself participate in such fundraising.
6. An elected official asked whether charitable foundations could be approached by the official and urged to consider contributing to not-for-profit entities across the City whose annual funding by the City Council had recently been cut due to fiscal constraints.

### Discussion

As noted, Opinion No. 2003-4 reserved for a future day the question of what charitable entities, besides City-affiliated not-for-profits, could be the beneficiaries of official fundraising by City public servants. While earlier Board opinions had directed some attention to the question of which City officials could engage in charitable fundraising and by what methods, those opinions had given little attention to the question of which charities could benefit from that activity. This opinion will address all three questions: for whom, by whom, and how.

1. Permissible Beneficiaries of Fundraising

In determining what not-for-profits not “affiliated” with the City may nevertheless be the beneficiaries of official fundraising, the Board has kept in mind both the “endorsement” concern and the fact that it was being asked about public servants’ fundraising in their official capacities – *i.e.*, as part of their City jobs, on City time, and using City resources. Without at all denigrating the Board’s recognition in Advisory Opinion No. 91-10 that “it is in the City’s interest to encourage the voluntary financial support of community groups, educational institutions and charities,” it is surely not within the scope of every public servant’s official duties to raise funds for any and every such group, institution, or charity, wherever located and whatever its mission.

Thus, the Board has concluded, first, that the not-for-profit for which funds are sought must have some nexus with the City and its residents. Thus, for example, an arts organization in California or an affordable housing provider in Buffalo will not be permissible beneficiaries of official fundraising by City public servants. This restriction is dictated by the requirement, most specifically enunciated in Board Rules Sections 1-13(a) and (b), that public servants may not use City time or resources for non-City purposes.<sup>2</sup>

Second, the mission of the beneficiary not-for-profit must have some connection with the mission or duties of the office or agency of the soliciting official. For example, while a not-for-profit organization dedicated to increasing affordable housing in the City might well be an appropriate beneficiary of fundraising by, for example, the Commissioners of Housing

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<sup>2</sup> This would not preclude City officials, as noted above (footnote 1), from engaging in fundraising efforts on their own time, and without the use of City letterhead or resources, for their alma maters and other favored charities, wherever they may be located, provided that they may not direct solicitations to those who have matters before them at their City agencies.

Preservation and Development and of Homeless Services, it would not be a permissible beneficiary of official fundraising by the Cultural Affairs Commissioner – although the latter could fundraise for a local performing arts group. This restriction is again based on the notion that the activity must bear some relationship to the soliciting official’s *City* responsibilities – and the realization, discussed below (p. 10), that it is often part of City officials’ duties to award City contracts and/or to distribute scarce City funding among competing not-for-profits working within their areas of responsibility. Admittedly, this limitation will impose greater restrictions on agency heads with defined areas of responsibility than it will, for example, on the Mayor, the Public Advocate, and City Council Members, whose official responsibilities are defined quite broadly. Nevertheless, even for these elected officials, the not-for-profit in question must have some connection not only with the City itself but also with the responsibilities of the soliciting official. Thus, for example, fundraising by a Borough President for the benefit of a theatre group in another borough would probably not qualify; nor would a Councilmember’s solicitation for a community group operating wholly outside his or her district.

Third, even if the not-for-profit provides services in the City and within the portfolio of a given elected official or agency head, such fundraising will not be permissible if the elected official or agency head has a personal “association” with the entity or its staff within the meaning of Charter Section 2601(5).<sup>3</sup> Pursuant to Charter Section 2604(b)(3), any use of a public servant’s office to benefit such an “associated” person or entity is strictly prohibited – and

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<sup>3</sup> Charter Section 2601(5) defines those “associated” with a public servant to include “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.”

fundraising is no exception. Thus, for example, and without limitation, if the soliciting official or her designee serves on the board of a not-for-profit, official fundraising for the benefit of that entity would be barred.<sup>4</sup> Likewise, if a spouse, a sibling, or a business partner of an agency head serves as a charity's executive director or other high-ranking staff member, then that agency head will also be barred from taking official actions seeking support for that charity. In short, if the elected official or agency head has a personal association with a not-for-profit, neither the official nor the agency may solicit support for the not-for-profit. Likewise, even if the elected official or agency head is not personally associated with the not-for-profit, the official may not assign fundraising responsibilities to any subordinate who is so associated.

The Board has considered but rejected imposing additional restrictions on the types of entities for which City officials may seek private funding. For example, the Board considered whether an agency head should be prevented from fundraising on behalf of entities with which his or her agency contracts or, conversely, whether such fundraising should be limited to groups with which an agency already contracts. The Board rejects both limitations. As to the latter, the Board observes that City agencies have limited budgets and priorities, but may identify excellent not-for-profit organizations that they are currently unable to fund. The Board sees no reason why an agency head may not seek private support for such organizations. On the other hand, the City may be contracting with organizations to provide vital services to New York's most needy

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<sup>4</sup> The Board does recognize an exception to this prohibition where the official serves on the entity's board of directors as part of his or her City job. Such *ex officio* positions may occur as a matter of law (*e.g.*, a statute provides for the appointment) or may occur *de facto* (*e.g.*, the official serves on the board only for his or her term in office). In such cases, the conflicts of interest law will not prohibit fundraising because, unlike the case where the official serves the not-for-profit in his or her personal capacity (*e.g.*, as an alum), the *ex officio* board member has no private interest that conflicts with his or her public duties.

residents but, especially in difficult economic times when these services may in fact be most needed, these organizations may be experiencing shortfalls in both public and private funding. The Board can find no basis in Chapter 68 for concluding that City officials may not seek private support for the very organizations that, as part of their official duties, they have identified as worthy of receiving public funding were it available.

With regard to the “endorsement” concern, the Board has, for similar reasons, concluded that permitting officials to seek funding for given not-for-profit organizations within their areas of responsibility does not impermissibly favor such organizations over those not so supported. In reaching this conclusion, the Board does not reject prior decisions, including Opinion No. 92-15, discussed above, that expressed such an “endorsement” concern. Those opinions were summarized in Advisory Opinion No. 2000-3, which permitted Police Commissioner Safir to author a letter that would serve as an introduction to a book being published to raise funds for the Police Museum, a not-for-profit entity not affiliated with the City. In Opinion No. 2000-3, the Board noted that its earlier decisions, though generally prohibiting official endorsement of such enterprises as books or films, nevertheless admitted of circumstances where such an endorsement would be appropriate, particularly where “the City’s interest [is] the clear determinant for the endorsement.” Advisory Opinion No. 95-2 at 4. Where such a “City interest” can be identified, permitting officials to make distinctions with regard to private fundraising does not allow for “favoritism” among competing not-for-profit entities any more than when they are required by their official duties to make such choices in designating specific not-for-profits for *public* budget support (see 9 Rules of the City of New York Section 1-02(e)). In addition, elected officials and agency heads regularly decide, consistent with the Board’s Valuable Gift Rule, Section 1-01,

which invitations to charitable fundraising events to accept, and elected and high-ranking officials may decide to which not-for-profit organizations they will provide congratulatory letters to be included in the organization's fundraising materials (see Advisory Opinion No. 98-14).

The Board sees no merit in a rule that would require City officials to support all City charities or to support none. Indeed, the Board could enunciate no selection criteria beyond those outlined above (nexus to the official's office or agency and no disqualifying personal interest) that would be both consistent with Chapter 68 and not so general as to be ultimately meaningless. Elected and appointed officials are selected for, among other things, their good judgment, and the Board finds no basis in Chapter 68 to limit the discretion of these officials as to their official charitable fundraising if they are exercising discretion within their defined areas of responsibility, and if they are barred (as they always are) from furthering their own or their associates' personal interests. The Board is satisfied that the protections afforded by, for example, the City's comprehensive procurement regulations, as well as the ultimate protection afforded in the ballot box, are, in the language of Opinion No. 95-2, sufficient "safeguards...to protect against the appearance that some private organizations are receiving preferential treatment at the expense of other, similarly situated organizations." *Id.* at 4.

## 2. Who May Engage in Fundraising

The Board next determines that official charitable fundraising by City officials may be undertaken only by elected officials and agency heads, or by their specified designees, and only after a personal determination by the elected official or agency head of which not-for-profits will be supported. Elected officials and agency heads are in the best position to make the determinations as to which not-for-profits qualify under the criteria set forth above, and while

they may delegate the actual solicitations, they themselves must make the determination that the work of the not-for-profit in question supports the mission of their City office or agency, so that it is a permissible beneficiary of its official fundraising. Unless those judgments are reposed in high-level officials, it would leave virtually any City employee free to use City time and resources for the benefit of favored private charities, with the attendant risks of misuse of that time and resources, as well as undirected judgments about which entities should receive the support of City fundraising efforts.

### 3. How Fundraising May Be Conducted

Finally, the Board concludes that official solicitations for “unaffiliated” not-for-profits should comply in all respects with the procedures and limitations for fundraising on behalf of the City and City-affiliated entities, as set forth in Opinion No. 2003-4. As noted above, these procedures were, in the main, designed to avoid the appearance of coercion. Thus, the Board determines that untargeted solicitations for unaffiliated not-for-profits will be permissible, as well as those targeted solicitations not made to those persons or firms with matters pending or about to be pending before the office or agency of the soliciting official. Further, as required in Opinion No. 2003-4, all such solicitations *must contain an explicit statement* that a decision to give or not give will have no impact on any official action and will likewise have no impact on access to City government officials.

Opinion No. 2003-4 also contained a requirement that agencies report to the Board, every six months, a list of all contributions over \$5,000 from private sector sources received by the

agency or its affiliated not-for-profits.<sup>5</sup> The Board believes that a similar reporting requirement with respect to fundraising for unaffiliated entities would help ensure that the restrictions set forth in this Opinion are followed. However, the Board realizes that City officials are not in a position to know what contributions may have been received by unaffiliated entities as a result of their fundraising efforts, and that it would place an unfair burden on the recipient entities to keep track of and report such contributions. Beyond that, requiring such reporting might have the undesired effect of increasing the appearance of coercion that the Board's restrictions are designed to minimize. Accordingly, in the case of unaffiliated entities, the Board will require agency heads and elected officials to report to the Board every six months only the identities of those not-for-profit organizations for which the office or agency sought private support.<sup>6</sup>

#### 4. Dispositions of Requests for Advice

To illustrate the application of the foregoing determinations to specific cases, we now return to the six individual requests for advice described above. In response to those requests, the Board advised as follows:

1. The elected official with citywide responsibilities was permitted to become co-chair of a fundraising program of a national not-for-profit organization, and to use his City position to solicit funds for that program, because the specific program

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<sup>5</sup> The Board emphasizes that the instant opinion concerning not-for-profits *not* affiliated with the City in no way relieves City officials from their responsibilities set forth in Opinion No. 2003-4 concerning City-affiliated entities, including, without limitation, the officials' responsibilities to pre-clear with the Board their fundraising for such entities and to make the above-referenced reports of contributions.

<sup>6</sup> The reporting cycle will be the same as provided for in Opinion No. 2003-4—no later than May 15 and November 15, for the six month periods ending March 31 and September 30, respectively. The Board will make such reports public.

was one that the elected official had determined, within the scope of his official duties, would support a major initiative of his City office.

2. Similarly, the elected official who proposed to participate in his official capacity at a public fundraising event in the City to “kick off” a major fundraising initiative by a charity was permitted to do so, because the beneficiaries of the charity’s services included many thousands of residents of the City and of the area served by the elected official.
3. An agency head, as well as two of his deputies, were permitted to solicit funds for a national not-for-profit, based on the agency head’s determination that the organization furthered, on a national level, initiatives adopted by the official’s own City agency; the agency head’s service on the organization’s board was determined to fall within the *ex officio* exception (*see* footnote 4, *supra*), because he served on the board as part of his City job. However, the agency head was expressly cautioned that – as required by Advisory Opinion No. 2003-4 – no solicitations could be directed to any person or firm with a matter pending or about to be pending before him or his agency.
4. In contrast, the agency head who sat on the board of directors of a not-for-profit organization dedicated to finding a cure and better treatment for a particular disease was advised that she *could not* fundraise for that organization in her official capacity – both because the organization’s mission was not significantly related to the work of the City agency headed by the official *and* because she sat on its board in her personal capacity (*i.e.*, not *ex officio*). However, she was free

to raise money for the organization in her personal capacity – *i.e.*, without using City time or resources – so long as no vendors, contractors, or employees of the agency were solicited.<sup>7</sup>

5. The agency head who asked whether he could consent to his alma mater raising funds for a campus building to be named in his honor was advised that he could, so long as (a) he did not himself participate in such fundraising while he remained in office; (b) no vendors or contractors of his agency would be approached for donations; and (c) the City official would not be told who had made donations.
6. The elected official was permitted to urge charitable foundations to consider contributions to not-for-profit entities across the City whose annual funding by the City Council had recently been cut due to fiscal constraints, so long as no distinctions were made among beneficiaries falling into that category (other than sorting such entities according to fields of charitable endeavors supported by each foundation). The Board concluded that, unlike an agency head making determinations among not-for-profits within his or her area of responsibility, it was not within the elected official's City duties to make such distinctions, and doing so would thus raise the "endorsement" concern.

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<sup>7</sup> A recent Board enforcement disposition reinforced this prohibition, also noted herein at footnote 1, against using one City's position for the benefit of an entity with which one has a *personal* association within the meaning of Charter Section 2601(5). See *COIB v. Cosgrave*, COIB Case No. 2007-290 (2008), where the Board issued a public warning letter to an agency head for providing a list that included the representatives of firms with present and potential business before his agency to an out-of-state not-for-profit on whose board he served in order that these individuals might be invited to a fundraising event of the not-for-profit.

### Conclusion

Elected officials and agency heads, and their designees, may in their official capacities, using City time and resources, solicit and otherwise encourage private contributions to not-for-profit organizations, after a personal determination by the elected official or agency head that the not-for-profit's work supports the mission of their City office or agency. Such solicitations must include a statement that a decision whether or not to give will not result in official favor or disfavor. But they may not target for these solicitations any person or firm with a matter pending or about to be pending before their City office or agency, and they may take no such action on behalf of any organization with which they are associated or that would benefit a person or firm with whom or which they are associated. Each City office or agency must file a public report with the Board by May 15 and November 15 of each year disclosing the identity of each not-for-profit organization for which the office or agency sought private contributions in the six-month period ending March 31 and September 30.

/s/

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