



● **Audit and Ethics Committee**

1/22/2019 Committee Meeting

---

4a

**Subject**

---

Review of the policies and procedures of the Ethics Office and Recommended Changes

**Executive Summary**

---

In July 2017, at the request of the Chairman of the Board, the General Manager entered into a contract for legal services with Wilmer Cutler Pickering Hale and Dorr LLP (Wilmer Hale) to review the policies and procedures of Metropolitan's Ethics Office and provide recommendations for consideration by Metropolitan's Board. In September 2017, the Metropolitan Board accepted the resignation of Metropolitan's Ethics Officer and appointed Metropolitan's General Auditor to serve as the interim Ethics Officer.

In February 2018, Wilmer Hale made a presentation to the Executive Committee regarding their review of the policies, procedures, and governance of the Ethics Office. After the presentation, the Board recommended that staff work with new counsel to propose appropriate actions to assist in the implementation of policies approved by the Board. The areas of discussion include the reporting structure for the Ethics Officer and the policies, procedures, guidelines, and applicable Administrative Code provisions relating to the work of the Ethics Office.

In January 2018, the law firm Olson Hagel & Fishburn (Olson Hagel) was engaged to independently review the findings and recommendations of Wilmer Hale, make recommendations designed to clarify the role, enhance the operational effectiveness of the Ethics Office, and assist in the implementation of any changes authorized by the Board.

In May 2018, Olson Hagel provided the Board with an initial review of the Wilmer Hale report and discussed the requirements of SB 60 relating to Metropolitan's Ethics Office. Olson Hagel is completing the review and recommendations in four phases: (1) reporting structure for Ethics Officer; (2) overall duties of the Audit and Ethics Committee and the Ethics Officer; (3) review and clarification of the jurisdiction, powers, and responsibilities of the Ethics Office, including the conduct of investigations and related matters; and (4) education, training, and compliance by the Ethics Office.

The first two phases have been completed. Olson Hagel made recommendations regarding the reporting structure for the Ethics Officer and recommended that the Audit and Ethics Committee becomes a Standing Committee. At the direction of the Board, the firm worked with staff to prepare proposed amendments to the Administrative Code to implement the recommendations that were approved by the Board. The proposed Administrative Code changes were reviewed by the Audit and Ethics Committee in September 2018, and as modified by the Committee, approved by the Board in November 2018.

This letter addresses Phase 3.

**Details**

---

In May 2018, Olson Hagel provided the Board with an initial review of the Wilmer Hale report and discussed the requirements of SB 60 relating to Metropolitan's Ethics Office. Olson Hagel is completing its review and recommendations in four phases: (1) reporting structure for Ethics Officer; (2) overall duties of the Audit and Ethics Committee and the Ethics Officer; (3) review and clarification of the jurisdiction, powers, and responsibilities of the Ethics Office including the conduct of investigations and related matters; and (4) education, training, and compliance by the Ethics Office.

The first two phases have been completed. Olson Hagel made recommendations regarding the reporting structure for the Ethics Officer and recommended that the Audit and Ethics Committee becomes a standing committee. At the direction of the Board, the firm worked with staff to prepare proposed amendments to the Administrative Code to implement the recommendations that were approved by the Board. The proposed Administrative Code changes were reviewed by the Audit and Ethics Committee in September 2018, and as modified by the Committee, approved by the Board in November 2018.

This letter addresses Phase 3, review and clarification of the jurisdiction, powers, and responsibilities of the Ethics Office including the conduct of investigations and related matters. Phase 3 generally involves the reorganization and redrafting of Division VII of the Metropolitan Administrative Code. This division covers the authority of the Ethics Office to conduct investigations of Metropolitan officials and contractors; the matters over which the Ethics Officer has primary authority to educate, advise, and conduct investigations; and the procedures for conducting such investigations including time limitations, rights of the subject of the investigation, protecting confidentiality, resolving disputes over access to Metropolitan documents, making investigations public, and penalties for violations.

Also included within Division VII is the Metropolitan Conflict of Interest Code required by state law to identify employees who must disclose personal financial interests (Form 700) and their disclosure categories. Any modifications of the Conflict of Interest Code will happen in a separate process as part of the mandatory biennial review by the Fair Political Practices Commission (FPPC) later in 2019.

Due to the number of issues to be discussed with the Committee and Board, it is anticipated that the discussion will occur over two meetings. The first Committee meeting, in January, will present issues and seek direction from the Committee regarding the types of matters over which the Ethics Office has primary authority to investigate, including applicable state ethics laws and proposed revisions to the Metropolitan-specific ethics rules. The second Committee meeting in February will address issues related to the procedures for conducting Ethics Office investigations and a proposed Contractors' Code of Conduct. After the Committee and Board provide direction, the applicable changes to Metropolitan's Administrative Code will be drafted and brought to the Committee and Board for approval.

Many proposed changes are minor clean-ups to the Administrative Code. The goal of the discussion with the Committee is to consider the major policy items relating to: (1) the types of matters over which the Ethics Office will have primary authority for education, advice, and investigation; (2) the recommendation to include standards articulated in state ethics laws as Metropolitan standards of conduct for purposes of education, advice, and internal investigations; and (3) revisions to the existing Metropolitan-specific ethics rules.

The current policy and Administrative Code provisions include a hybrid of state law conflict of interest provisions and other provisions which are, in some cases, unclear and difficult to enforce. The recommendation is to: (1) incorporate the standards of conduct in applicable state conflict of interest laws into Metropolitan's ethics provisions; and (2) include "Metropolitan-specific" ethics rules that go beyond state law.

In addition, the recommendation is to clean up the current provisions by deleting the rules that are hybrids of state law and Metropolitan-specific rules, and clarifying the rules, including eliminating rules that are more properly within the purview of others such as Human Resources. In addition, it is recommended that the Administrative Code be reorganized to provide greater clarity and to add new rules that are mandated by MWD Act Section 126.7.

1. The state ethics laws standards proposed to be incorporated into Metropolitan Code include:
  - a. Government Code (GC) § 1090 et seq. [Conflicts of interest rules related to contracts]
  - b. GC § 84308 as applied to Metropolitan Directors [rules related to solicitation of campaign contributions from those with matters before Metropolitan and prohibiting participation in certain matters involving campaign contributors]
  - c. GC § 87100 et seq. and the applicable PRA definitions and FPPC implementing regulations
  - d. GC § 87407 [Influencing prospective employment]
  - e. GC § 89502 [Honorarium ban]
  - f. GC § 89503 [Limits of gifts from single source in calendar year]
  - g. GC § 87460 [Loans to public officials of more than \$250 from employees or contractors]

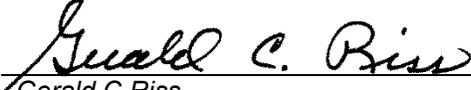
- h. GC § 87500 et seq. [Requirement that public officials file Form 700, Statement of Economic Interest]
- i. Any state regulation implementing these sections

2. The proposed “Metropolitan-Specific” ethics rules include:

- a. Misuse of Position or Authority [current § 7104]
  - i. Current: Metropolitan Officials shall not use their official authority to coerce someone else to provide an advantage or economic benefit to that official or a third party;
  - ii. Proposal: Metropolitan Officials shall not use their actual or perceived governmental authority to obtain a personal benefit other than one naturally arising from proper performance of governmental functions
- b. Limitation on Associations [current § 7112]
  - i. Current: prohibits participation in any association structure likely to mislead the public.
  - ii. Proposal: Move this provision to the Board Governing principles section of the Administrative Code [current §1300].
- c. Recusal Due to Bias [current § 7121]
  - i. Although this provision provides guidance to Board members to recuse themselves when they deem it appropriate, it is difficult to enforce.
  - ii. Proposal: Move to Board Governance Principles of the Administrative Code [current §1300].
- d. Requirements on “Revolving Door” and post-Metropolitan employment [current §7122]
  - i. This provision is difficult to enforce since former employees cannot be disciplined.
  - ii. Proposal: Move existing restrictions to the proposed new lobbying section (see 4(b) below).
- e. Additional Requirements Gifts [current § 7130]
  - i. Current rule appears to prohibit quid pro quo arrangements.  
Proposal:
    - ii. Impose a limit on the value of gifts from those doing business with Metropolitan lower than the current state limit on gifts (currently \$500 annually). Limit application to Form 700 filers.
    - iii. Define the term “gift” the same as provided under state regulations; and
    - iv. Set the Metropolitan specific gift limit at \$50 annually.
- f. Honoraria [current § 7131]
  - i. Proposal: Eliminate since the state ethics law standards would be incorporated into the Code
- g. Free Ticket Distribution Policy [current § 7132]
  - i. Proposal: Modify to conform to current FPPC rules, as needed.
- h. Campaign Contributions [current § 7108]  
Proposal:
  - i. Keep current language prohibiting soliciting campaign contributions at Metropolitan facilities or with the use of Metropolitan’s seal; and
  - ii. Prohibit the solicitation of political contributions from employees of Metropolitan by Directors and others in a position of authority.
- i. Contracts and Grants [current § 7105]  
Proposal:
  - i. Eliminate portions based on Government Code 1090, which would be moved to another section of the Code; and

- ii. Maintain existing restrictions on the hiring of, or contracting with, Directors for a period of one year after they leave the board.
    - j. Communications on Procurements [current § 7106]
      - Proposal:
        - i. Keep the current language prohibiting ex parte communications by Directors to staff about vendors/consultant selection; and
        - ii. Require disclosure of ex parte communications between Directors and prospective vendors/contractors.
    - k. Use of Confidential Information [current § 7107]
      - Proposal:
        - i. Clarify that any unauthorized release of confidential information is a violation; delete requirement of financial gain or personal benefit.
        - ii. Add a definition of confidential information to protect all privileged and confidential information including: information, whether contained in a document or recorded or communicated in another manner, which is maintained confidentially at Metropolitan and, if contained in a record that would not be subject to disclosure under the state Public Records Act.
        - iii. Clarify that the Ethics Office will investigate the release of confidential information by an employee if it is for financial gain or personal benefit and investigations potentially involving Directors.
        - iv. Investigations involving employees not involving financial or personal benefit will be within the purview of Human Resources.
    - l. Whistleblower Protections (§ 7110)
      - i. Proposal: Limit jurisdiction to Whistleblower retaliation related to alleged violations of the Metropolitan ethics rules. All other Whistleblower matters are within the purview of Human Resources.
    - m. Improper Activities and the Reporting of Such Activities [current § 7109]
      - i. Proposal: Eliminate as within the purview of Human Resources.
    - n. Fair and Equal Treatment provision [current § 7103]
      - i. Proposal: Eliminate as vague and unenforceable.
    - o. Nondiscrimination and Harassment section [current § 7111]
      - i. Proposal: Staff seeks guidance from the Committee whether the Ethics Officer should have jurisdiction to investigate harassment claims regarding Directors and, if not, who should have. Nondiscrimination and harassment claims relating to employees are handled by Human Resources.
- 3. Proposal: The following items from the Current Operating Policies should be added to the Administrative Code:
  - a. No Metropolitan official may accept or apply for employment with any vendor/contractor in negotiations with Metropolitan concerning the employee's area of responsibility [Current Operating Policy H-03, paragraph 1].
  - b. The portions of Operating Policy dealing with political activities including the:
    - i. use of Metropolitan facilities for political activities; and
    - ii. engaging in political activities during Metropolitan work hours [Current Operating Policy H-03, paragraphs 14 and 15].
  - c. Clarify Operating Policies to provide that jurisdiction over all other matters (i.e., most outside work and/education activities affecting job performance, nepotism, romantic relationships, and community activities) is with Human Resources, not the Ethics Office.

4. Proposal: The following new Metropolitan-Specific ethics rules should be added to the Administrative Code:
- a. Failure to cooperate with or knowingly provide false or misleading information to the Ethics Officer during an investigation is a violation of Metropolitan-Specific ethics rules.
  - b. Provisions regarding lobbying activities as required by SB60
    - i. Require registration and reporting by persons compensated by a third party to represent that party or to otherwise attempt to influence decisions of Metropolitan officials regarding contracts, entitlements, or policies.
    - ii. Include the current Administrative Code section concerning revolving door and apply it to former employees who would now have to register to lobby.

  
\_\_\_\_\_  
Gerald C Riss  
Interim Ethics Officer

1/17/2019  
Date