



● **Audit and Ethics Committee**

2/26/2019 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. At the January Audit and Ethics Committee, Olson Hagel presented their initial Phase 3 recommendations.

This letter addresses comments from the Committee regarding the items discussed in January and the continuation of the discussion of 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.

Phase 3 generally involves the reorganization and redrafting of Division VII of the Metropolitan Administrative Code. This division contains the substantive ethics rules applicable to Metropolitan officials (Directors, officers, and employees) and 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

In January, Olson Hagel reviewed recommendations regarding the Ethics Office's jurisdiction – the matters that are subject to investigation, including recommendations to: (1) incorporate specific state ethics laws into Metropolitan's Administrative Code; (2) modify, delete or move certain Metropolitan-specific ethics rules; (3) add some new Metropolitan-specific ethics rules; and (4) move certain Operating Policies regarding ethics into the Administrative Code.

At the January Audit and Ethics Committee, Olson Hagel received comments and direction from the Committee. This letter addresses the continuation of Phase 3, including the provision of additional information and clarifications requested by the Committee in January and completion of the review and clarification of the jurisdiction, powers, and responsibilities of the Ethics Office including the conduct of investigations and related matters.

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.

In March, Olson Hagel will address Phase 4: education, training, and compliance activities of the Ethics Office. After the Committee and Board provide direction regarding the recommended changes described in Phases 3 and 4, the applicable changes to Metropolitan's Administrative Code will be drafted and brought to the Committee and Board for approval.

1. Review of Issues Considered by the Committee in January

a. Internal Disclosures: Business Relationships Between Board and Vendor/Contractors [SB 60/MWD Act § 126.7(b)(1)]

One of the issues addressed in January was internal disclosures and potential ethical abuses related to *“direct and indirect business relationships between board members and contractors or vendors, and between board members and officers or employees of member public agencies.”*

Directors expressed concern that any new rule provide sufficient clarity for the Board to clearly understand their obligations.

i. The Committee's feedback was to:

- define “ex parte” and tighten the definition of “staff”
- review the original reasoning for the rule prohibiting staff communications
- reevaluate this section, clarify terms in it and decide where and how a director would disclose information regarding communications with vendors and staff.

ii. To address the concerns, the proposal has been clarified to:

- Amend current rule (Section 7106) to permit communications between Directors and staff making the decisions to retain a vendor/contractor regarding the procurement of

specific goods or services, but require that the Director provide a disclosure to the applicable Committee and full Board.

- In addition, add a rule that would require the same type of disclosure for communications between Directors and vendors/contractors regarding a specific procurement of goods or services or regarding other specific matters pending a Board decision.

b. Harassment/Discrimination

- i. Currently, the Administrative Code requires the Ethics Officer to investigate allegations of discrimination and harassment made against Board members. The proposal was to move this responsibility outside the jurisdiction of the Ethics Office.
- ii. Committee requested a report on how the Legislature handles such matters. The recently adopted Legislative policy provides for Legislative Counsel's new Workplace Conduct Unit to investigate claims and draft a summary of the evidence for review by an independent panel of labor law experts who will determine facts and make recommendations to the respective legislative house. The policy provides that the Workplace Conduct Unit may hire outside investigators. The respective legislative house will determine how to respond to the findings.
- iii. Proposal:
 - Move allegations of discrimination and harassment made against Directors to an ad hoc subcommittee within the Executive Committee appointed by the Board Chair for that individual case. No director who is the subject of any discrimination or harassment claims may be appointed to the subcommittee.
 - Require the hiring of outside investigators who report their findings to the subcommittee.

2. Review of Issues from Phase 3, Part 1 That Were Not Presented in January

a. Move Rules from Current Operating Policies into the Administrative Code

- i. Incorporate into the Code portions of the Operating Policies 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, 14 and 15].
- ii. The Operating Policies should be updated to eliminate Ethics Office jurisdiction over all other matters (i.e., employee outside work /education activities affecting performance, nepotism, romantic relationships between employees and non-political community activities).

b. Lobbying [SB 60/MWD Act § 126.7(a)]

- i. Current Policy/Practice: The current Administrative Code does not include rules on lobbying. SB 60 requires the Ethics Office to adopt rules on lobbying.
- ii. Proposal:
 - Require registration and reporting by persons compensated by a third party to represent that party to influence the decisions of Metropolitan officials regarding contracts, entitlements or policies.
 - Incorporate the current Administrative Code section prohibiting Metropolitan employees and Directors from representing third parties for one year after termination of their employment.
 - Recommended lobbying rules would:
 - Define lobbyist as a non-employee independent contractor compensated to communicate with the Metropolitan Board or staff for the purpose of influencing a decision of the Board or staff
 - Require lobbyists to register with Metropolitan

- Require lobbyists to disclose the topic that they lobby on and whether they lobbied the Board and/or staff.

3. **Phase 3, Part 2: Outside Vendors, Investigations by the Ethics Officer and Conflict of Interest Code**

a. **Outside Vendors and Contractors**

- i. Current Policy/Practice: No ethics rules are applicable to outside vendors and contractors.
- ii. Proposal: All vendors and contractors will be subject to a code of conduct (which will be included in any written contract and displayed on MWD's website).
 - The Ethics Officer, General Manager and General Counsel shall jointly approve the terms of the Contractor Code of Conduct, including:
 - Contractors abide by ethics laws and policies.
 - Contractors must timely cooperate with any investigation by Ethics Office.
 - Failure to comply with Contractor Code maybe a basis for termination and debarment from future contracts.
 - Contractors may not provide campaign donations to board members in violation of Government Code section 84308.
 - Since some vendors and contractors may qualify as public officials and are subject to many of the same ethics rules that apply to Metropolitan officials, any written contract with a vendor or contractor providing consulting services shall alert the vendor/contractor to their potential status as a public official under state conflict of interest laws.

4. **Authority to Investigate and Jurisdiction**

- i. Current Policy/Practice: The Administrative Code requires the Ethics Officer to investigate complaints concerning any violations of ethics rules and policies except matters alleging only generalized unfairness, unequal treatment, or bias or certain alleged misuses of confidential information by officers or employee.
- ii. Proposal:
 - Clarify this section to specify that the Ethics Officer will investigate all formal and informal (i.e., anonymous) complaints filed with the Ethics Officer and within the jurisdiction of the Ethics Office if the alleged facts of the complaint would constitute a violation of the ethics rules in the Administrative Code.
 - Provide that the Ethics Officer:
 - Shall have the discretion to not investigate complaints lacking sufficient facts even if true, to investigate a violation.
 - Shall not investigate complaints regarding matters outside the jurisdiction of the Ethics Office as provided in the Administrative Code (e.g., complaints under Human Resources' purview; bias by Human Resources).
 - The Ethics Officer may initiate investigations, without a formal or informal complaint, involving possible violations.
 - Other departments within Metropolitan shall refer to Ethics Officer ethics violations that come to the attention of those departments.
 - Initial decision by Ethics Officer to not investigate does not preclude future investigation.
 - Ethics Officer shall provide acknowledgement of receipt of the formal complaint to complainant, advise him/her of the confidentiality of any investigation and that no additional updates will be provided.

- If Ethics Officer determines the Ethics Office does not have jurisdiction or there are insufficient facts, even if the facts alleged in the complaint are true, to investigate a violation, the complainant shall be so notified.
- If any alleged violations involve a Director, the General Manager, the General Counsel, or the Auditor, then the investigation shall be conducted by outside counsel or investigator in consultation with the Ethics Officer.
 - Prior to retaining outside counsel, the Ethics Officer shall notify the Audit and Ethics Committee Chair, unless the Chair is the subject of the investigation, in which case the Vice Chair shall be notified.
- iii. General Counsel shall review any contract with outside counsel or investigator.
- iv. The Ethics Officer shall only investigate violations of: (1) state ethics laws incorporated into the Administrative Code as a violation of ethics rules; and (2) other Metropolitan ethics rules specified in Chapter 1.
- v. All other matters (e.g., sexual harassment by employees, allegations that an employee misled the Board of Directors, etc.) are beyond the jurisdiction of the Ethics Office and should be referred to other departments, as appropriate.
 - The Ethics Officer may consult the General Counsel regarding any investigation at his/her discretion.
 - The Ethics Officer shall provide a copy of any investigative report to the General Counsel at the same time as the report is provided to the subject of the investigation.
- vi. The Ethics Officer may conduct an investigation concurrently in cases involving core ethics allegations that cross into authorities of other departments, assuming the investigation concerns in part matters over which the Ethics Office does have jurisdiction.
- vii. The Ethics Officer shall abide by the requirements set forth in the Administrative Code for conducting any investigation under the Ethics Office's jurisdiction

5. **Article 2 – Procedures for Investigations**

- i. Current Policy/Practice:
 - Ethics Officer will use the preponderance of the evidence standard for making determinations of a violation of the Administrative Code. [current § 7140].
 - The Ethics Officer shall prepare a written report that summarizes the allegations investigated, the evidence relied upon, any exculpatory evidence and the conclusion reached based on that evidence.
- ii. Proposal: No change.

6. **Investigation Timelines**

- i. Current Policy/Practice:
 - Guidelines provide for 120 business days.
 - Currently, there is no statute of limitations for how far back in time the Ethics Officer may investigate alleged violations of the Administrative Code.
- ii. Proposal:
 - Investigations must be conducted expeditiously and completed within 180 calendar days, except as provided below. Investigation commences upon notification of the subject of the investigation that he/she is the subject of an investigation, either because a complaint was filed or the Ethics Officer has initiated an investigation without a complaint.

Investigation terminates upon service of the investigative report on the subject of the investigation.

- For any investigative matter that extends beyond 180 days, the Ethics Office shall provide written notice to the subject with an explanation and expectation for the completion time. The Ethics Officer shall notify the Audit & Ethics Committee Chair and Vice-Chair whenever a specific investigation matter extends beyond 180 days and provide periodic updates on the status of the matter.
- Impose a five-year statute of limitations. Ethics Office will not investigate allegations based on events that occurred more than five years ago.
- If there is no jurisdiction or there are insufficient facts to prove a violation, then the Ethics Officer shall so inform the complainant.

7. Due Process Rights of Accused [SB 60/MWD Act § 126.7(c)(3)]

i. Current Policy/Practice:

- The subject of an investigation is notified after a decision to investigate is made.
- The subject of the investigation may object to the jurisdiction of the Ethics Office to conduct an investigation.
- The subject shall have the opportunity to respond to the allegations, affirmatively present evidence, and identify witnesses to provide further information.

ii. Proposal: Reorganize and clarify current rules to:

- Provide that if the Ethics Office decides to investigate a matter, the subject of the investigation shall be notified of the investigation within 15 business days.
- Notice shall not be given to a subject if the Ethics Officer determines that there is no objective evidence to support an allegation or if the allegation is outside the jurisdiction of the Ethics Office.
- Make clear the Ethics Officer is not precluded from investigating related potential violations beyond those identified in the notification to the subject of the complaint.
- Include advising the subject of the investigation of his/her obligation to cooperate with the investigation and that the failure to do so can lead to disciplinary action pursuant to Metropolitan's rules and MOU provisions as applicable, regardless of the outcome of the investigation.
- The subject of the investigation shall also be afforded a reasonable opportunity to present any facts, legal arguments or other relevant information to the Ethics Officer concerning the investigation and alleged violations.
- The Ethics Officer shall protect the identity of any person who is the subject of an investigation until such time as the investigation is completed or as otherwise provided by the Administrative Code.
- If the Ethics Officer determines a violation has occurred, he or she shall provide the subject of the investigation a written report that summarizes the allegations investigated, the evidence relied upon, any exculpatory evidence and the conclusion reached and allow the subject 14 days to file any response.
- Provide that if the Ethics Officer determines after an investigation that there has been no violation, the subject of the investigation shall be so informed.

8. Protecting Confidentiality of Sources [SB 60/MWD Act § 126.7(c)(3)]

i. Current Policy/Practice:

- Ethics investigations are confidential.
- Complainants and witnesses are protected against retaliation.

- ii. Proposal: Unauthorized disclosure of the identity of a complainant, a subject of an Investigation, or a witness, or any other significant investigatory information, constitutes a breach of Metropolitan's ethics rules. The Ethics Officer shall protect the identity of any whistleblower.

9. Access to Metropolitan Records by the Ethics Officer

- i. Current Policy/Practice: The Ethics Office Guidelines for investigations states that the Ethics Office investigators shall have full, free, and prompt access to all records, documents, electronic data, property, and functions within Metropolitan which, in the opinion of the Ethics Officer, are relevant to the subject matter under investigation.
- ii. Proposal:
 - The Ethics Officer shall have reasonable access to all Metropolitan documents, files, records, or other materials deemed relevant to the Ethics Officer's investigation as determined by the Ethics Officer.
 - To the extent there is a dispute regarding access to information, including information that may be protected by the attorney-client privilege and/or attorney work product doctrine, the Ethics Officer and General Counsel shall confer and discuss with the affected department staff as may be appropriate, to make a reasonable good faith effort to resolve the dispute.
 - The General Counsel's office shall be included in any such discussion.
 - If the dispute is not resolved after meeting and conferring, the Ethics Officer and General Counsel shall jointly present the matter to the Chair of the Audit and Ethics Committee. If the matter is not satisfactorily resolved at that stage, the matter will be considered by the Board, as a majority of the Board is required to waive Metropolitan's attorney-client privilege.

10. Article 3 – Procedures for Making Investigation Results Public [SB 60/MWD Act § 126.7(d)]

- i. Current Policy/Practice:
 - SB 60 requires the Ethics Office to make available to the public "the results of the investigations that it undertakes".
 - The Investigation Guidelines state that full investigation files for specific complaints are confidential investigatory files for purposes of the Public Records Act and shall be subject to release only as required by law and as appropriate and necessary to address a breach.
 - The Administrative Code also provides that a Director may appeal to the Executive Committee a decision by the Ethics Officer that a violation has not been proven by a preponderance of evidence.
- ii. Proposal:
 - At the conclusion of an investigation, the nature of the alleged violation and general results of the investigation shall be made public by the Ethics Officer without revealing the identity of the subject. However, if the Ethics Officer determines that a Director has violated Metropolitan's ethics rules, this rule does not prevent the Director's identity from becoming public in a public board proceeding to address that violation.
 - To protect the due process interests of an accused, remove provision of Code permitting a Director to appeal to the Executive Committee a determination by the Ethics Officer that a violation has not occurred. A Director will already have the right to present information in response to a finding of his/her own violation.
 - Nothing in these rules would prevent the Fair Political Practices Commission, Attorney General, or District Attorney from revealing the identity of the subject after conducting

their own investigation based on a referral from the Ethics Officer, according to those entities' disclosure rules.

11. Article 4 - Penalties for Violation of Ethics Rules [SB 60/MWD Act § 126.7(e)]

- i. Current Policy/Practice: The current Administrative Code does not include specific penalties for violation of the ethics rules. SB 60 requires the Ethics Office to adopt a "schedule" of penalties for the violation of ethics rules.
- ii. Proposal:
 - Establish a penalties policy for ethics violations organized by position and, for employees, will be based on Metropolitan disciplinary rules and MOU provisions as applicable.
 - Penalties for ethics violations by Directors will be decided by the Executive Committee and may include private warning letter, public censure, temporary or permanent removal from committees and referral to the Director's appointing authority.
 - Penalties for ethics violations by unrepresented employees shall be referred to and determined by the appropriate management and may include written reprimand, suspension and termination.
 - Penalties for ethics violations by a Department Head (the four direct reports to the Board) shall be referred to and determined by the Executive Committee.
 - Penalties for ethics violations by represented employees shall be referred to Human Resources and determined by appropriate management pursuant to the employee's bargaining unit MOU.
 - Penalties for ethics violations by contractors/vendors will be subject to penalties as determined by the Chairman of the Board which may include termination of a contract or debarment.
 - In addition to the above disciplinary penalties, serious violations of the Political Reform Act incorporated into the Administrative Code shall be referred to the Fair Political Practices Commission, Attorney General or District Attorney as determined by the Ethics Officer.
 - Define serious violation as, including but not limited to, (1) intentional and knowing violation of Metropolitan ethics rules incorporated from the Political Reform Act and Government Code 1090, (2) violation of Metropolitan's conflict of interest laws incorporated from the Political Reform Act, (3) failure to disclose reportable financial interests where a conflict is found regardless of intent, and violation of Government Code section 84308 as incorporated into the Administrative Code, (4) gift limit violations for gifts from persons doing business before Metropolitan.
 - Any referral to a state regulatory authority, an appropriate Metropolitan authority, or the Executive Committee shall include the written report prepared by the Ethics Officer, relevant documents as determined by the Ethics Officer and any response to the written report submitted by the subject of the investigation.
 - No referral shall be made to a state agency or to Human Resources if the Ethics Officer concludes that the subject of the investigation, in good faith, relied upon the advice of the Ethics Officer.

12. Conflict of Interest Code

- i. Current Policy/Practice: Metropolitan is required by the FPPC to adopt, every two years, a conflict of interest code specifying the staff positions required to file a Statement of Economic Interest (Form 700) and the disclosure categories for each staff position.
- ii. Proposal: No change. The Ethics Officer shall update the Conflict of Interest Code during calendar year 2019 as required by law.

 2/22/2019

Gerald C Riss Date
Interim Ethics Officer

Ref# e12669648