



● **Board of Directors**
Audit and Ethics Committee

3/26/2019 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 of 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, advice 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 and February Audit and Ethics Committee meetings, Olson Hagel presented their Phase 3 recommendations in two parts. Part 1 has been completed and the Committee is halfway through its consideration of Part 2 of Phase 3. The expectation is the Committee will complete its review of Part 2 at its March meeting and also review recommendations regarding Phase 4.

This letter addresses the discussion of Phase 4.

Details

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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, advice, and compliance by the Ethics Office.

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Phase 3 involved 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.

At the January and February Audit and Ethics Committee meetings, Olson Hagel reviewed their Phase 3 recommendations regarding the Ethics Officer'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 March meeting, Olson Hagel will complete the review of Phase 3 and address Phase 4 – education/training, advice 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.

The following is a summary of the remaining Phase 3 recommendations and the Phase 4 recommendations.

REVIEW OF ISSUES FROM PHASE 3, PART 2 THAT WERE NOT PRESENTED IN FEBRUARY

1. 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, they 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 business 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.

2. Protecting Confidentiality of Sources [SB 60/MWD Act § 127(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.

3. 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.
- 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.

4. Article 3 – Procedures for Making Investigation Results Public [SB 60/MWD Act § 127(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.

5. Article 4 - Penalties for Violation of Ethics Rules [SB 60/MWD Act § 127(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, that 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, or 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.
- 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 section 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; and (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.

6. 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.

PHASE 4 ETHICS OFFICE RESPONSIBILITIES FOR EDUCATION/TRAINING, ADVICE, AND COMPLIANCE

1. Education and Training

- i. Current Rules:
 - The Ethics Office shall, "educate board, staff, contractors and subcontractors regarding [Metropolitan's Ethics] rules." (SB 60 § 126.7(c)(2).)
 - "The Ethics Officer shall educate the board, staff, contractors and subcontractors concerning the [Ethics] rules." (Admin Code § 6470(d).)
- ii. Current Practice:
 - The Ethics Office gives training presentations to management/new employees/new managers on the role of the Ethics Office.

- Previously, the Ethics Office prepared a pamphlet on the role of the Ethics Office and ethics rules.
- Ethics Office publishes a monthly report on compliance, advisory services and education and training.
- Ethics Office provides Form 700 training for MWD employees who file Form 700.
- Ethics Office certifies AB 1234 training compliance.

iii. Proposal:

- Emphasize the role and need for education/training to ensure compliance with Metropolitan Ethics Rules.
- Ethics Office to prepare materials to use for education and in trainings:
 - Written guide to Metropolitan ethics rules.
 - Additional video training materials for Metropolitan's MyLearning system.
 - Other modes of education that connect to long-term memory and retention.
 - Revise/update as needed.
- Require that employees receive ethics training every two years, either in person or online training, and impose certification requirement.
- Require that Ethics Office train appropriate Metropolitan staff regarding outside vendors/contractors compliance with Metropolitan ethics rules applicable to such persons.
- Require orientation ethics training for new Board members.
- Provide periodic in-person training at Board meetings.
- Provide regular written updates on changes in State ethics laws to the Board.

2. Advice

i. Current Rules:

- The Ethics Office shall, "operate as an independent entity that is not subject to political influence and shall be staffed with professional, qualified persons." (SB 60, § 126.7(c)(1).)
- "Any Board member, officer or employee who is unsure of any right or obligation arising under this Code may seek the assistance of the Ethics Officer, request an opinion from the General Counsel of Metropolitan, or seek oral or written advice from the Fair Political Practices Commission." (Admin Code § 7113)

ii. Current Practice:

- Ethics Office provides advice regarding Metropolitan's current ethics rules.
 - The Ethics Office keeps this advice confidential, though no rule requires this and such advice may be subject to public records requests.
 - The Ethics Office does not advise on past conduct. If a question or request for advice concerns past or ongoing conduct, the Ethics Office may investigate the matter or refer it as appropriate to the EEO unit, other Metropolitan group, or an outside enforcement agency.
 - In cases involving specific facts, advice is generally in writing and only addresses prospective conduct, but no rule requires this.
- The Ethics Office compiles data regarding the number and topic of advice questions.

i. Proposal:

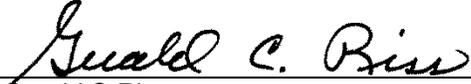
- Revise section 7113 to clarify that Metropolitan Directors and staff may seek advice regarding Metropolitan’s ethics rules, not limited to “any right or obligation arising under this Code.”
- Advice by the Ethics Office will be provided in writing either to the requestor or in a memorandum to file.
- Advice provides immunity.
 - A written advice letter will provide the requestor immunity from internal disciplinary action or referral to state agency by the Ethics Officer.
 - For immunity to apply, the following requirements must be met:
 - A request for this advice must be in writing, provide specific information about the requestor, and contain sufficient information for the Ethics Office to conduct a complete analysis.
 - The requestor must comply with any guidance or recommendations contained within the advice.
 - Advice in response to a written request does not provide immunity to any person other than the requestor.
 - Advice by the Ethics Officer does not provide immunity from enforcement by the Fair Political Practices Commission or any law enforcement agency.
- The Ethics Office will only advise on prospective questions, not on past acts.
- Ethics Officer shall not give third party advice – advice requested by someone other than to whom the response applies.
- Advice is confidential.
 - All advice shall be treated confidentially, but recipient shall be notified in advance that:
 - The communications associated with the advice are not protected by attorney-client privilege (no matter who gives it).
 - The advice is not necessarily confidential and exempt from disclosure under the Public Records Act or other legal process [i.e., an internal investigation, subpoena, or production request].
 - Advice will be provided for prospective conduct only and that information provided regarding past conduct could result in an investigation.
 - The Ethics Officer shall also shield from other Metropolitan Departments, to the extent possible, conversations regarding prospective advice to prevent retaliation.

3. Compliance

i. Current Rules:

- The Ethics Officer provides AB 1234 Training which requires certain officials to take two hours of training in ethics principles and laws every two years.
- The Ethics Officer monitors the compliance of Directors and employees designated by the Board to comply with this training. (Admin Code § 6474(a).) The Ethics Officer shall be the filing officer on behalf of Metropolitan to receive and file statements of economic interest. (Admin Code §6470(e).)
- FPPC regulations require the Ethics Officer, as the filing officer for Metropolitan, to review Form 700s. This includes:

- Reviewing the information contained in at least 20 percent of the statements which are filed on time; at least half of which must be selected on a random basis.
 - Reviewing all statements which are filed late to determine whether the summary page is completed correctly, and all schedules applicable to the filer are either attached or checked “no reportable interests.” The attached schedules include all required descriptive information for each financial interest and information contained on one schedule suggests that required information is omitted on either that schedule or another schedule.
 - Prompt notification to the filer if the review of the schedules indicates that the filing is incomplete or incorrect in any material respect. (FPPC regulation, § 18115(a).)
- ii. Current Practice:
- The Ethics Officer tracks compliance with AB 1234, provides certificates of compliance, and sends notifications to non-compliant officials.
 - The Ethics Officer provides reminders regarding the filing deadline for Form 700 compliance, has created an online Form 700 training program, offers an in-person consultation for new filers, and assists persons with compliance as requested.
 - The Ethics Office tracks the status of Assuming Office, Annual and Leaving Office statements and sends notifications to non-filers. After two written communications, non-filers are referred to the FPPC for further action.
 - Ethics Office reviews Form 700s for certain filers pursuant to FPPC regulations, but may not be in full compliance with FPPC rules regarding duties to review as filing officer.
- iii. Proposal:
- Incorporate current notification and tracking practices into the Administrative Code.
 - Require the Ethics Officer to comply with FPPC regulations regarding filing officers’ duties.
 - Conduct a full review of all Form 700 filers required to file under Government Code section 87200 (Board members, and certain specified high-level staff). This includes:
 - Review of Form 700s to ensure internal consistency and consistency with past year filings.
 - Advise filers to file an amendment, if necessary.
 - Review of individual filers’ declared financial interests. If Ethics Office staff has reason to believe a filer’s official duties could potentially affect a declared financial interest, the Ethics Office shall contact the filer and offer to provide advice to ensure no inadvertent conflict of interest arises.
 - Provide separate online trainings for Section 87200 Form 700 filers and Code filers.
 - The Ethics Office will assist the appropriate Metropolitan departments responsible for outside vendor/contractor compliance with Metropolitan requirements related to ethics rules, including the contractor code of conduct.


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Interim Ethics Officer

3/21/2019
Date