



- Audit and Ethics Committee

10/7/2019 Committee Meeting

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## Subject

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

## Executive Summary

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At the direction of the Board, the law firm of Olson Hagel & Fishburn has been engaged in reviewing the policies and procedures of Metropolitan's Ethics Office and developing recommended changes. At the June 25, 2019 Audit and Ethics Committee (Committee) meeting, Olson Hagel presented revisions to the proposal, along with draft Administrative Code amendments.

After assuming office in July, the new Ethics Officer began reviewing the proposal, consulting with staff and Olson Hagel, and developing perspectives on the issues addressed in the proposal. In summary, there are several issues that the Ethics Officer believes should be addressed in the Administrative Code amendment process. These issues are described in this letter and will be discussed further during the Committee presentation.

After receiving additional input from the Committee, this proposal will be further developed with the goal of presenting draft Administrative Code amendments for the Committee's consideration at its next meeting.

## Details

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### Background

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 the Ethics Office and provide recommendations for consideration by Metropolitan's Board.

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, Olson Hagel & Fishburn (Olson Hagel) was engaged to independently review the findings and recommendations of Wilmer Hale, make recommendations designed to clarify the role and 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 prepared its review and recommendations in four phases: (1) reporting structure for the 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.

Proposed Administrative Code changes implementing Olson Hagel's recommendations regarding the reporting structure for the Ethics Officer and recommendation that the Audit and Ethics Committee become a standing committee of the Board were approved by the Board in November 2018.

Olson Hagel presented recommendations regarding the jurisdiction, powers, and responsibilities of the Ethics Office, including the conduct of investigations and related matters; Metropolitan's compliance with SB 60; and provision of education/training and advice by the Ethics Office to the Audit and Ethics Committee at the January, February, and March 2019 Committee meetings. Comments and concerns expressed by the Committee have been considered in preparing the recommendations. The final step in the process is the reorganization and revision of the Metropolitan Administrative Code pertaining to ethics to incorporate the recommended changes, as discussed further below.

### **June 2019 Audit and Ethics Committee Meeting**

At the June meeting of the Audit and Ethics Committee, Olson Hagel presented an overview of the complete set of proposed Administrative Code amendments. That presentation explained some areas where Olson Hagel's recommendations had been modified. Those areas included: (1) private communications by directors with staff; (2) private communications by directors with vendors and contractors; (3) limiting the scope of whistleblower retaliation allegations within the Ethics Office's jurisdiction; (4) new rules for contractors; and (5) new rules for lobbyists and lobbying firms. In the course of discussion, questions arose about additional topics, including gift limits, referrals to outside enforcement agencies, and whether or when a subject would learn about allegations that the Ethics Office does not investigate.

After hearing directors' comments about proposed gift limits, Olson Hagel indicated they would modify the proposal to remove additional gift regulations for directors. Directors will be subject to the state law criteria for reporting and limits on gifts.

### **Review by Ethics Officer: Additional Recommendations**

Beginning in July, the new Ethics Officer began reviewing the recommendations and consulted with Ethics Office staff, the General Counsel staff, and Olson Hagel. The Ethics Officer has recommended modifying the proposed amendments as follows:

#### *1. Oversight and Feedback*

The Ethics Officer would like to propose an oversight and feedback mechanism between the Ethics Officer and the Audit and Ethics Committee Chair and Vice-Chair. This arrangement would allow the Ethics Officer to share information or concerns involving any matter and receive input from the Audit and Ethics Committee Chair and Vice-Chair. Limiting this oversight and feedback function to two directors on an ad hoc basis is necessary to protect confidentiality and avoid communications that could be deemed a meeting under the Brown Act. The Audit and Ethics Committee Chair and Vice-Chair would have access to otherwise confidential information concerning complaints or investigations. In performing this role, the Chair and Vice-Chair would be under an obligation of strict confidentiality not to disclose the details of any such matter. There would be an understanding that their input is only advisory. The Ethics Officer believes that this type of oversight and feedback mechanism would be beneficial to the Ethics program.

#### *2. Gift Limits for Employees*

The June proposal would have prohibited employees who file Statements of Economic Interests (Form 700) from accepting gifts over \$50 from any Metropolitan contractor within the employee's disclosure category.

The Ethics Officer's proposal extends this gift policy to all Metropolitan employees, regardless of whether they are Form 700 filers. Also, the policy would prohibit employees from accepting gifts from all Metropolitan contractors, with limited exceptions: (1) modest food and refreshments in the course of official business meetings; and (2) items of nominal intrinsic value. The combined value of such items from a single contractor in a calendar year could not exceed \$50.

#### *3. Establishing Levels of Severity for Violations*

Currently, there is no requirement that a report finding a violation of ethics rules include any designation of the severity of the violation. The Human Resources and Legal Departments have informed the Ethics Office that it would be useful to have an objective determination of the level of severity of a violation to assist in determining the appropriate level of discipline.

The Ethics Officer's proposal includes four levels of violations, along with mitigating and aggravating factors that could affect that determination.

4. *Discretion Whether to Open Investigations*

Under the June proposal, the Ethics Officer has discretion to decline to conduct an investigation if: (1) the matter is outside the Ethics Office's jurisdiction; or (2) the complaint lacks sufficient information to establish a potential violation. The Ethics Officer's proposal would permit the Ethics Officer to decline or defer investigation for additional reasons, including but not limited to determining that an alternative process or means is available to adequately resolve the issue or concern. When exercising this discretion, the Ethics Officer would document the basis for that determination in the case file.

5. *Notice to Subjects of an Investigation*

Under the June proposal, the Ethics Officer would be required within 15 business days of receiving a complaint to initiate an investigation and provide notice to the subject. The Ethics Officer's proposal would extend this period to 30 calendar days (therefore, approximately one week longer). The Ethics Officer would use this 30-day period to vet allegations to determine if an investigation should be opened. If the Ethics Officer determines not to initiate an investigation, under normal circumstances there would be no notice to the subject of the complaint. This is necessary to avoid retaliation or perceived retaliation against complainants.

6. *Quarterly or Monthly Board Reports on Pending Investigations*

The June proposal requires monthly reports to the Board about the number and status of pending investigations. The Ethics Officer's proposal would modify this requirement to a quarterly report.

7. *Whistleblower/Retaliation Investigations and Protections*

Section 7110 of the Administrative Code requires the Ethics Office to investigate all complaints of interference with, or reprisal for, reporting: (1) a work-related violation of law; (2) gross waste of funds; (3) gross abuse of authority; (4) specified dangers to public health or safety; (5) abuse of official authority for personal gain; or (6) a conflict of interest; unless the Office of Ethics has a conflict of interest.

Under the June proposal, the Ethics Office would be responsible only for complaints alleging retaliation for reporting of ethics violations or for cooperating with an ethics investigation. Responsibility for cases alleging retaliation for reporting violations of other rules would be handled by the Human Resources Department.

After considering the issue, the Ethics Officer believes it would be beneficial to Metropolitan for the Ethics Office to maintain broader responsibilities in this area, but with improved clarity as to that scope. The Ethics Officer's proposal includes a more concise and focused statement of the types of retaliation allegations that the Ethics Office would be authorized to investigate.

Along with the matters proposed in June, that scope would also cover complaints alleging retaliation for any good faith reporting to a Metropolitan official or outside authority of: (1) a work-related violation of law or Metropolitan policy, aside from Equal Employment Opportunity-related complaints; (2) a gross abuse or waste of Metropolitan resources; or (3) a gross public health or safety danger. The Human Resources Department will continue to handle alleged retaliation by employees arising from Equal Employment Opportunity-related complaints, including sexual harassment.

In addition, the Ethics Officer's proposal would require that for individuals to receive whistleblower protection from the Ethics Office, they must report the alleged misconduct either to a relevant outside agency, to the Ethics Office, to the Human Resources Department, or to any manager other than the subject of the complaint. Making this reporting requirement more defined will avoid confusion about whether and when employees are entitled to whistleblower protection. It also will allow the Ethics Office to protect the identity of a whistleblower and the due process rights of a subject.

8. *Public Notice for Contracts of \$50,000 or More*

SB 60 requires that Metropolitan's ethics rules address and seek to avoid potential ethical abuses relating to public notice and approval procedures for contracts of \$50,000 or more. (MWD Act, section 126.7(b)(3).) The June proposal made it an internal ethics violation to intentionally fail to comply with Metropolitan's notice and selection procedures for contracts.

The Ethics Officer recommends adding an additional requirement in this area. Under the revised proposal, Metropolitan would publicly report all existing contracts of \$50,000 or more. Metropolitan already makes some of this information available to the public through quarterly board reports. Making this information more readily available would assist the public in understanding and knowing about the scope and size of public contracting at Metropolitan. The Ethics Officer believes this type of enhanced transparency is consistent with the legislative purposes of SB 60.

**Next Steps**

Based on input from the Committee, staff will prepare revised proposed amendments to the Administrative Code for consideration by the Committee at its next meeting.



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Abel Salinas  
Ethics Officer

10/3/2019  
Date