



San Francisco Ethics Commission

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Date: March 14, 2022

To: Members of the Ethics Commission

From: Michael Canning, Policy Analyst

Re: **AGENDA ITEM 6 – Presentation, discussion, and possible action on proposed amendments to strengthen City’s gift and ethics laws under consideration as 1) potential Ethics Commission ballot measure and as 2) amended Ethics Commission regulations.**

Summary

This memo provides an update on the proposed amendments to strengthen the City gift and ethics laws under consideration as a draft ballot measure and regulation amendments. Due to the required and ongoing meet and confer process, the Commission was unable to place the proposed ballot measure on the June 2022 ballot and now has the November 2022 ballot as the next possible opportunity for placing these reforms before voters. Based on continued engagement with stakeholders, Staff is presenting several revised recommendations at this meeting for the Commission to consider as discussed in this memo, with draft language presented in Attachment 1, Attachment 2, and Attachment 3.

Action Requested

The Commission consider and discuss the revised recommendations contained in this memo and potentially express support for, or identify areas of concerns with, the recommendations as proposed.

Background

In January 2020, the U.S. Department of Justice began bringing criminal corruption charges against multiple City officials, employees, and contractors. The charges allege numerous instances in which individuals seeking favorable outcomes from City government provided things of value to City officials in an attempt to influence the actions of those officials.

In response, the Ethics Commission conducted a comprehensive review of the City’s ethics laws in phases to ensure that the types of conduct alleged in the criminal complaints are appropriately prohibited and deterred by City law and that any other relevant weaknesses identified in the laws can be addressed and the laws strengthened. These reforms have been proposed to address demonstrated shortcomings in the City’s ethics laws and help prevent future acts of corruption like those alleged in the ongoing federal corruption investigation.

- The first phase of the project addressed the issue of [behested payments](#), which are payments made at the behest of a government official to a third party. That work [resulted in legislation enacted](#) in December 2021 that now bans the solicitation of behested payments by City officials

and employees who are required to file the Form 700 Statement of Economic Interests from soliciting behested payments from those who have official business before their department or who have otherwise sought to influence them.

- The second and third phases of the project resulted in policy reports and recommendations to strengthen City laws that govern [gifts made directly to City officials](#), [gifts made through City departments](#), and [other essential ethics provisions](#).

The recommendations contained in the last three reports that stemmed from Phase II and III of the Commission's project are the basis for a proposed [ballot measure](#) and [regulation amendments](#). For additional reference, the Commission has produced a [summary chart listing the proposed changes](#) that details the sections of the San Francisco Campaign and Governmental Conduct Code that would be changed by the proposed ballot measure and regulation amendments.

These proposed changes would clarify and expand aspects of the City's restricted source rule, which limits gifts to City officials from those doing business with their department and those who have recently attempted to influence them. The changes would also strengthen the City's bribery rule and expand the number of City officials required to complete annual ethics training. A brief, high-level overview of the recommendations is provided below.

Gift-Related Recommendations (Phase II)

- Create a definition of *gift* in the Campaign and Governmental Conduct Code.
 - Regulations would include certain state law gift exceptions but omit those that undermine the purposes of the restricted source rule.
 - Regulations containing local exceptions to the restricted source rule would be amended.
- Expand the application of the restricted source rule to prohibit other aspects of a gift transaction beyond the receipt or solicitation of the gift by an official, including:
 - Officials soliciting or accepting gifts from restricted sources for any immediate family members of an official.
 - The giving of gifts by lobbyists and permit consultants.
 - The use of an intermediary by the source or recipient of a gift to circumvent the restricted source rule.
 - Any person or organization acting as an intermediary for a restricted source gift.
 - Any official accepting anything from a City department or non-City organization or person that bestows a personal benefit on the official if the official knows or has reason to know that the true source of the gift is a restricted source.
- Clarify how the restricted source rule applies to City contractors.
- Amend the restricted source rule to explicitly apply to individuals and entities that apply for or obtain a permit, license, or other entitlement for use from a City department.
- Amend the restricted source rule to explicitly apply the rule to affiliates (directors, officers, and major shareholders) of an entity that is a restricted source.

- Prohibit gifts from permit expeditors to officials and employees in departments that issue permits.
- Create a single, standardized disclosure requirement for payments to City departments.
- Amend regulations containing exceptions to the rule against gifts from subordinates.

Essential Ethics Provision Recommendations (Phase III)

- Strengthen San Francisco's bribery rule by incorporating elements of the federal bribery rule.
- Strengthen the requirement that a City official disclose any personal, professional, or business relationship with persons involved in a government decision the official will make.
- Extend the annual ethics training requirement to all Form 700 filers.
- Codify rules contained in departmental Statements of Incompatible Activities into the Code and discontinue departmental Statements of Incompatible Activities.
- Standardize penalty provisions to make it clear that all violations of the Code are punishable and that proving a particular mental state is not required.
- Protect ethics laws from legislative amendments by requiring approvals by a supermajority of the Ethics Commission and Board of Supervisors for legislative amendments.
- Add a general provision that allows the Commission to require electronic filing of public disclosures.

To illustrate only the Code sections actually being changed and excluding sections that are just being reauthorized as they already appear in the Code, the Commission has produced a [condensed version of the measure](#). The condensed version is intended to serve only as a discussion tool and to make it easier for readers to identify the changes that would result in the law should the measure be enacted. The [full version of the measure](#) shows the changes that would be made, including the entirety of the stricken and reauthorized language that must be adopted procedurally to achieve the substantive changes proposed.

Meet and Confer Process Ongoing

State law requires that the City meet and confer with employee bargaining units prior to undertaking certain actions that would impact City employees. The Department of Human Resources and City Attorney's Office have advised that the Commission must meet and confer with employee bargaining units before taking action on the proposed ballot measure and regulation amendments.

The Department of Human Resources distributed the text of the measure and regulations to employee unions on November 10th. On November 17th, Staff met with Municipal Executives Association (MEA) regarding the proposals. On December 9th, the Department of Human Resources distributed a closeout notice to employee unions stating that because no questions or concerns had been received since the November 17th meeting, the meet and confer process was concluded. Later on December 9th, MEA notified DHR and the Commission that the union wished to continue the meet and confer process. In light of this, the City Attorney's Office and DHR have repeatedly advised that the Commission not vote on the proposals at its meetings since December 10th.

The Commission had originally intended to vote on placing the ballot measure on the June 7th, 2022 ballot, however the continuation of the meet and confer process prevented the Commission from voting

before the March 4th deadline to place items on the June ballot. With the March 4th deadline passed, the next opportunity for voters to potentially act on the measure is the election on November 8th, 2022. In order to place an item on the November ballot the Commission must vote to do so before August 5th, 2022.

Since the initial meeting on November 17th, Staff has met with MEA representatives four additional times.¹ The most recent meeting was held this week and as of the publication of this memorandum on March 14th, the meet and confer process has not been concluded. Staff will continue to prioritize working with DHR on the meet and confer process and will present potential revisions to the measure and regulations that may come out of the process to the Commission as they are available.

Revised Recommendations for Ballot Measure and Regulations

Throughout this policy project Staff have sought to engage stakeholders and incorporate feedback from a variety of sources. This process has carried on concurrent with the meet and confer process, as stakeholders have continued to engage with Staff and directly with the Commission during its recent meetings. Based on discussions during recent Commission meetings, feedback from stakeholders, and issues raised during the meet and confer process, Staff is revising or elaborating on a few of this project's recommendations. These revisions are presented in this memo in concept form, with draft language shared through attachments; they do not appear in the current draft ballot measure and regulation amendments linked in the background section above.

Staff recommends the following revisions to the draft ballot measure:

1. Remove liability for restricted sources who *give* unlawful gifts.

Staff's initial recommendation was to prohibit the *giving* of gifts by restricted sources, with the *giver* of the unlawful gift being subject to potential penalties. This would have been a change to current law, in which the restricted source rule prohibits City officials from accepting or soliciting gifts from restricted sources but does not subject the *giver* of such gifts to potential penalties. Staff heard concerns that expanding liability to the givers of restricted source gifts would potentially ensnare members of the public who were unaware of the rule and that it would be difficult to reach this population with adequate training resources.

Staff believes that liability for the giving of restricted sources gifts can be removed from the measure without weakening the proposed reforms to the restricted source rule. The activity concerned (the flow of gifts from restricted sources to City officials) can still be prohibited, it will just be the City officials who would potentially face penalties for violating the rule, not the restricted sources.

Staff, however, recommends preserving the gift giving liability for two types of restricted sources: lobbyists and permit consultants. Currently law already prohibits the giving of gifts by lobbyists, which should continue. Permit consultants operate in ways similar to lobbyists and should be subject to the same prohibition on giving gifts.

The proposed language changes associated with this revised recommendation are detailed in Attachment 1. Section 3.216(b)(4) should be amended so that prohibition on giving gifts only applies to

¹ Additional meetings were held on December 17th, January 13th, February 16th, and March 14th.

lobbyists and permit consultants, not all persons. Additionally, Section 3.216(b)(2) would need to be revised to specify that gifts directed by a restricted source are also prohibited, as it would no longer be being captured for all restricted sources in Section 3.216(b)(4).

2. Revise how seeking, obtaining, or possessing a license, permit, or other entitlement for use can make a person a restricted source.

Staff's initial recommendation was to specify that persons seeking, obtaining, or possessing a license, permit, or other entitlement for use from a department would become a restricted source for the officers and employees of that department. This would be accomplished by including the seeking, obtaining, or possessing of a license, permit, or other entitlement for use in the definition of "doing business with the department." Staff heard concerns that this change would make the rule too expansive and difficult to comply with as many employees within a department do not work on licenses, permits, or other entitlements for use and would be potentially unaware of such activities. Staff heard suggestions to limit this aspect of the restricted source rule to only those licenses, permits, and other entitlements for use which are approved by the department's board or commission, however this would overly narrow the rule and leave open the potential for problematic gifts to City officials from those seeking licenses, permits, or other entitlements for use from their departments.

Staff's revised recommendation is to focus this aspect of the restricted source rule so that only items that require high-level approval from department or City leadership make a person a restricted source for all of the City officials of that department, but to also specify that if a City official is personally and substantially involved in the process, the person would become a restricted source for that specific City official. This change would still ensure that persons seeking the most high-level licenses, permits, or other entitlements for use are restricted sources for the entire department, but otherwise only require City officials to be aware of the licenses, permits, and other entitlements for use that they were involved in personally and substantially.

The proposed language changes associated with this revised recommendation are detailed in Attachment 2. Subsection (b) of the definition of "doing business with the department" would be narrowed to only include items "approved by the department head, the department's board or commission, or the Board of Supervisors." A new subsection (c) of the definition of "restricted source" would be added to make persons "seeking, obtaining, or possessing a license, permit, or other entitlement for use, in which the officer or employee was personally and substantially involved" restricted sources. Subsection (d) (formerly (c)) of the definition of "restricted source" would also need to be amended so that affiliates of the persons referenced in the new subsection (c) are clearly captured as restricted sources.

Staff recommends the following revisions to the draft regulation amendments:

1. Add a gift exception for greeting cards.

Staff's interpretation of the definition of "gift" would not consider a greeting card or similar correspondence to be a gift for the purposes of the restricted source rule, however this example has been raised as a concern multiple times, so Staff is now recommending this be clarified through regulation. The draft language for this regulation is presented in Attachment 3.

2. Add a gift exception for things available to the general public.

This newly proposed regulation is also being made for clarification purposes. Staff's interpretation of the definition of "gift" already considers items provided at free or discounted rates to members of the general public, made without regard to the City official's status, to not be gifts for the purposes of the restricted source rule. However, given concerns raised by stakeholders, Staff recommends creating this explicit exception, so that it can be listed with the other exceptions and clearly communicated to City officials and members of the public. The draft language for this regulation is presented in Attachment 3.

Staff requests the Commission consider and discuss the revised recommendations contained above and potentially express support for, or identify areas of concerns with, the recommendations as proposed in Attachment 1, Attachment 2, and Attachment 3. Staff will then use these revised recommendations to prepare updated versions of the ballot measure and regulation amendments for the Commission to review and potentially vote on during an upcoming meeting.

Update on Behested Payments Rule

As referenced above, the first phase of this policy project addressed behested payments and [resulted in legislation](#) which went into effect on January 23, 2022. This new legislation prohibits City officials and employees who are required to file the Form 700 Statement of Economic Interests from soliciting behested payments from those who have official business before their department or who have otherwise sought to influence them.

The Board of Supervisors recently decided to place [a measure regarding behested payments](#) on the June ballot. The Ballot Simplification Committee has completed [its digest for this measure](#) and the measure will appear on the June 7, 2022 ballot. This measure would do two things if passed: 1) protect the behested payment rule from legislative amendment undertaken solely by the Board of Supervisors by requiring a majority vote by the Ethics Commission and a two-thirds vote by the Board of Supervisors for future legislative changes, and 2) expand the prohibition on the solicitation of behested payments to City contractors seeking approval from the Board of Supervisors. Both of these changes are similar to recommendations previously made by Staff to the Commission and would strengthen the City's behested payments rules if enacted.

Staff have also remained in communication with the Board of Supervisors regarding ongoing feedback they have been hearing from stakeholders regarding the behested payments rule. Staff will continue this engagement and work with the Board of Supervisors to assess if there are aspects of the rule that need to be further clarified.

Next Steps

As of the publication of this memo, the meet and confer process on the Commission's proposed ballot measure on gifts and essential ethics laws has not been concluded. Staff will continue to work with DHR as required on the meet and confer process and will present to the Commission any recommended additional revisions once available. At this time, Staff would request feedback from the Commission and members of the public on the revised recommendations presented in this memo.

ATTACHMENT #1

Agenda Item #6 - Attachment #1

Proposed Revisions to Draft Ballot Measure to Remove Liability for the Giver of a Prohibited Gift

3/14/22

- **Amend 3.216(b)(4) to read:**
 - *(4) No ~~person~~ lobbyist or permit consultant may offer or make a gift to any officer or employee, or any of the officer's or employee's family members, nor direct the offer or making of any gift by any other person, if the person knows or has reason to know that they are a restricted source for the officer or employee. For purposes of this subsection (b)(4), a person who is required to register as a lobbyist or permit consultant and file disclosures but fails to do so shall be considered a restricted source for any official for whom, had the person properly registered and file disclosures, the person would be considered a restricted source.*

- **Amend 3.216(b)(2) to read:**
 - *(2) No City officer or employee may solicit or accept a gift from any person, including any gift obtained through a City department, if the officer or employee knows or has reason to know that the gift was funded, ~~or~~ provided, or directed by a restricted source.*

ATTACHMENT #2

Agenda Item #6 - Attachment #2

Proposed Revisions to Draft Ballot Measure to Amend How Seeking, Obtaining, or Possessing a License, Permit, or Other Entitlement for Use Can Make a Person a Restricted Source

3/14/22

- **Amend (b) of the “doing business with the department” definition to read:**
 - *(b) seeking, obtaining, or possessing a license, permit, or other entitlement for use issued by the department and approved by the department head, the department’s board or commission, or the Board of Supervisors, until 12 months after the date the license, permit, or other entitlement for use was issued, extended, or otherwise approved or, if no license, permit, or other entitlement for use was issued or approved, 12 months after the day the final decision not to issue or approve was made.*

- **Insert a new subsection (c) within the definition of “restricted source” that reads:**
 - *(c) a person seeking, obtaining, or possessing a license, permit, or other entitlement for use, in which the officer or employee was personally and substantially involved, until 12 months after the date the license, permit, or other entitlement for use was issued, extended, amended, or otherwise approved or, if no license, permit, or other entitlement for use was issued or approved, 12 months after the day the final decision not to issue or approve was made.*

- **Amend (d) (formerly (c)) of the definition of “restricted source” so that it reads:**
 - *“(ed) an affiliate of an entity that qualifies as a restricted source under (a), ~~or (b), or (c).~~”*

ATTACHMENT #3

Agenda Item # 6 - Attachment #3 - Proposed Draft Regulation Changes

3/14/22

Proposed Revision 1: Addition of the following regulation, which specifies that the following is not a gift for the rules contained in Section 3.216(b).

(p) A greeting card, letter, or postcard.

Proposed Revision 2: Addition of the following regulation, which specifies that the following is not a gift for the rules contained in Section 3.216(b).

(q) A payment that is provided at a free or discounted rate to members of the general public, without regard to the officer or employee's status as a City official, such as promotional discounts or merchandise (swag bags, buttons, stickers, branded t-shirts, etc.), attendance at community events, food or product samples, product demonstrations.