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EXECUTIVE DIRECTOR

Date: February 4, 2009

To: Members, Ethics Commission

From: John St. Croix, Executive Director  
By: Mabel Ng, Deputy Executive Director

Re: Proposed amendment to post-employment restrictions

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San Francisco Campaign and Governmental Conduct Code (C&CG Code) section 3.234 contains three post-employment restrictions that govern City officers and employees. These are (1) a permanent restriction on representing any person other than the City on certain matters in which the officer or employee personally and substantially participated while in service to the City and in which the City still has a substantial interest; (2) a one-year ban on communications with the officer or employee's former department with an intent to influence a governmental decision; and (3) a one-year ban on future employment with a person that entered into a contract with the City where the former officer or employee personally and substantially participated in the award of the contract.

In considering questions regarding the application of the post-employment restrictions, staff has concluded that the law should be changed to make the provisions clearer and more equitable. Thus, staff recommends that the Commission approve the following proposed changes.

First, staff proposes to renumber and move some of the provisions so that they appear in a more logical order. Thus, section 3.234(a), which sets forth the general post-employment restrictions is renumbered (1) "Permanent Restriction on Representation in Particular Matters;" (2) "One Year restriction on Communicating with Former Department;" and (3) "Employment with Parties that Contract with the City." Current sections 3.234(a)(1)(E), and 3.234(a)(3)(B), addressing waivers, are consolidated into one section, proposed section 3.234(c).

Second, staff proposes grammatical and other non-substantive changes to renumbered section 3.234(a)(1)(A), the permanent ban on representation in certain matters. Additionally, staff proposes deleting subsection 3.234(a)(1)(A)(iv) ("which is the same matter in which the officer or employee participated as a City officer or employee") because it unnecessary surplus language. The deletion of this subsection will not change the meaning of the law.

Third, staff proposes to amend renumbered section 3.234(a)(2), the one-year restriction on communicating with a former department, to extend the prohibition to City employees and officers who have moved from one City department to another. The proposed changes will mean that an employee who leaves service from one City department to work for another City department will be subject to the one-year ban on communicating with his or her former department on behalf of someone other than herself or the City in an attempt to influence a governmental decision. Staff believes that these changes effectuate the intent behind the one-year ban. Under current law, an officer or employee who leaves the City cannot contact her former department on behalf of another for one year, while an officer or employee who changes departments can, even though the danger of improper influence is the same in both instances. The changes will help to ensure that the potential for, and the appearance of, undue influence, favoritism or preferential treatment is avoided.

Fourth, staff proposes to amend the one-year restriction on communicating with a former department (renumbered section 3.234(a)(2)) by exempting from the prohibition attorneys engaged in the practice of law. This proposed exception is consistent with a similar exception for attorneys in C&GC Code section 3.224, the City's Compensated Advocacy Ban. Additionally, the Commission has waived the post-employment prohibition in the past for former City officers and employees who seek to contact their former departments as attorneys after leaving City service. (*See, e.g.*, Commission meeting, April 12, 2004 [granting waiver request from former District Attorney Terrence Hallinan]; Commission meeting, October 23, 2006 [granting waiver request from former Deputy City Attorney Miguel Marquez].)

Finally, with respect to the ban on future employment, section 3.234(a)(3), staff proposes that a current or former City officer or employee who personally and substantially participates<sup>1</sup> in the award of a contract should not be employed by any party to that contract for one year – regardless of when the employee or officer leaves City service. The current law creates *two* relevant twelve-month periods: an officer or employee must look *backward* to determine whether he or she participated in the award of a contract in the twelve months prior to leaving City service, and also must look *forward* twelve months because the ban applies until one year after the termination of City service. This rule has proven confusing to departing employees and officers. Additionally, current law leads to unbalanced results. For instance, picture three City employees – A, B and C – who participate in the award of a City contract with Company on January 1, 2009.

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<sup>1</sup> “Participate personally and substantially” is defined in Ethics Regulation 3.234-5(e) as follows:

Participate personally means to participate directly, and includes the participation of a subordinate when the subordinate is under the direction and supervision of an officer or employee. Participate substantially means that the officer’s or employee’s involvement is, or reasonably appears to be, significant to the matter. Significant to the matter requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. Participate substantially relates not only to the effort devoted to a matter, but also to the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participation in a critical step may be substantial.

Employee A leaves City service the same day, Employee B remains in City service for *more than* twelve months, departing on January 2, 2010, and Employee C leaves City service *less than* twelve months later, on December 31, 2009. Under current law, Employee A and Employee B both can accept employment with Company on January 2, 2010. But Employee C cannot accept employment with Company until January 1, 2011 – because she will have left City service within twelve months of the contract and then must wait an additional twelve months before accepting employment with the contractor. This uneven application of the post-employment restriction serves no public policy purpose. Staff proposes amending the law to create a simple rule prohibiting employment within twelve months of the contract date, regardless of when the employee or officer leaves City service.

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