



## CITY OF SAN JOSÉ, CALIFORNIA

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### BOARD OF FAIR CAMPAIGN AND POLITICAL PRACTICES

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**TO:** RULES AND OPEN GOVERNMENT  
COMMITTEE

**FROM:** Adrian Gonzales, Chair  
Board of Fair Campaign  
and Political Practices

**SUBJECT:** Biennial Ethics Review

**DATE:** September 13, 2017

Pursuant to Section 607 of the City Charter, the Mayor is responsible for conducting a biennial review of the City's ethics ordinances and policies. With Ordinance Code Section 12.04.070 assigning the responsibility of making recommendations to the city council regarding campaign and ethics regulations, the Mayor's biennial review has conventionally started with the Board of Fair Campaign and Political Practices (Board) conducting a preliminary assessment of the City's related laws.

As the oversight body responsible for monitoring and enforcing the city's campaign and ethics laws, our recommendations are based on a cumulative review of complaint cases we have encountered over the past two years, feedback from the Offices of the City Clerk and City Attorney, and industry best practices. Please review the attached matrix outlining 12 recommendations (Topics) for streamlining, clarifying, and improving our City's ethics laws. Our recommendations range in complexity, some possible through immediate administrative action, and others requiring additional time to research and refine with the assistance of the City Council and administration. Narrative explanations are presented below, the recommendations being grouped into the following categories:

- Adjusting Reporting Requirements;
- Enforcement Procedures;
- Community Partnerships;
- Regulating the Distribution of Arena Tickets; and,
- Establishing Independence and Obtaining Adequate Resources.

### **Adjusting Reporting Requirements**

#### **Topic 1: Reporting for General Purpose Committees**

**Recommendation:** Require cumulative contribution reporting

**Discussion:** General Purpose Committees are campaign committees that support or oppose more than one candidate or ballot measure, possibly in different electoral jurisdictions. The City Clerk expressed concern that when General Purpose Committees file their campaign disclosure forms, it is difficult to determine how much a contributor has donated within a given election cycle. Campaign disclosure forms issued by the State and used in our City's reporting process already contain an optional section for reporting individual cumulative contributions. We recommend standardizing this reporting for all campaign committees active in City elections by amending Section 12.06.910 of the Ordinance Code to require that this column be completed.

## **Topic 2: Penalties for Candidates for Non-Compliance**

Recommendation: Maintain current remedial action for late and non-filers

Discussion: In June 2016, the Office of the City Auditor published its audit report of the City Clerk's Office, wherein one recommendation suggested creating additional steps to address repeat violations of filing deadlines. In consultation with the City Clerk, the Board has determined that additional remedial action is not necessary for late and non-filers since such violations are not pervasive, the City Clerk already has the power to fine candidates 10 dollars per day of delinquency pursuant to Ordinance Code Section 12.06.910, and the City Clerk is also obliged, pursuant to Section 12.06.920, to refer violations of campaign disclosure ordinances to the Board where violators can face steeper penalties.

## **Topic 3: Publishing Campaign Statement Information**

Recommendation: Keep publishing requirements, but research opportunities for automating campaign finance reporting and analytics

Discussion: Ordinance Code Section 12.06.920 requires the City Clerk to issues a press release and website posting of cumulative campaign expenditures and contributions two days prior to a city council/mayoral election. This process involves a lot of manual compiling and calculating of data from individual campaign filings that seem inefficient when new software systems and tools exist to automate campaign finance reporting analytics. For example, the City of Oakland partnered with Open Oakland, a local brigade of Code for America, to create an online portal, Open Disclosure, that automatically translates Oakland's campaign disclosure forms into easily accessible charts and graphs depicting how much money candidates and campaign committees raise and spend each election. If our City is able to create, procure, or partner with a similar service provider, we could automate campaign finance reporting and alleviate the City Clerk's responsibility of manually calculating and posting its static reports. We recommend keeping the current ordinance requirement in the spirit of transparency until we are able to automate the process. At the time of this report, the Office of the City Clerk reported that it has already requested that additional language addressing this type of automated reporting be included in the City's upcoming RFP addressing our electronic filing system for campaign and lobbyist reports.

## **Topic 8: Amend Form 504**

Recommendation: Direct staff to administratively update Form 504 on filing deadlines

Discussion: Ordinance Code Section 12.06.930 requires campaign committees to disclose post-election payment agreements, which are filed via the City Clerk's Form 504. City Clerk staff explained that some candidates have expressed confusion about what the deadline is to file this form. After reviewing the Ordinance Code and consulting with the Board, we recommend that the City Clerk use its administrative authority to revise Form 504 and clarify filing deadlines.

## **Enforcement Procedures**

### **Topic 6: Clarity of Resolution Language**

Recommendation: Update City Council Resolution 77879 to clarify language

Discussion: In addition to the Ordinance Code, the City Council dictates much of the Board's policies and procedures for overseeing enforcement activities through resolution. Currently, this document is known as Resolution 77879. In December 2016, the Board received a new City Attorney liaison who pointed out that over the years, the language and structure of our guiding Resolution has been changed and some of the language is inconsistent, redundant, and potentially confusing. In collaboration with the City Attorney, attached is a draft revised version of our

Resolution where you can see that many clauses have been made more concise by removing jargon and modernizing linguistics.

### **Topic 7: Process for Hiring Alternate Evaluator**

Recommendation: Amend Resolution 77879 to permit an Alternate Evaluator/Investigator

Discussion: A complaint filed June 5, 2015 by Tom Cochran against Manh Nguyen underwent a complete investigation by the Board's contract Evaluator and Investigator. In accordance with Section F.8 of Resolution 76954 (the predecessor to Resolution 77879), when our Investigator found evidence suggesting that other individuals were involved in violating the same campaign reporting requirement as the original Respondent, Manh Nguyen, the Investigator filed an amended complaint against the other alleged violators. While the Board stands by its compliance with the policies and procedures set forth by the City Council, concern was expressed by respondents and some members of the City Council that this process might create the appearance of a conflict of interest. The City Council subsequently updated our policies through Resolution 77879 which included an amendment to Section F.8 to have the City Clerk file amended complaints instead of the Investigator. In addition to this change, the City Attorney's Office has suggested revising our Resolution to expressly permit their Office to engage with an Alternate Evaluator/Investigator when appropriate. The Board supports this recommendation. Specific language is included in the draft revised Resolution attached to this report.

### **Topic 9: Complaint Intake Process**

Recommendation: Direct the City Clerk to work with the Board on researching ways to improve our complaint intake process.

Discussion: Pursuant to Resolution 77879, the current complaint intake and review process results in a public hearing, regardless of whether or not the complaint contained sufficient information to indicate a potential violation of Title 12 of our Ordinance Code. The Board has dismissed multiple complaints over the last few years wherein our Evaluator found no evidence indicating a possible violation of Title 12. The Board also believes that due to the public nature of our evaluation process, campaigns may seek to use this process for staging negative press as the local media regularly covers our public hearings even when our Evaluator recommends dismissal of complaints. It is our understanding based on initial online research that comparable jurisdictions, like the San Francisco and Los Angeles Ethics Commissions, California Fair Political Practices Commission (FPPC) and Federal Election Commission (FEC), moderate their evaluation process with more scrutiny so that evaluations which do not identify law violations or lead to enforcement actions are not publicly disclosed. The Board would like to work with the City Clerk to conduct additional research on how the other four local ethics commissions in California and the FPPC manage their complaint intake and review process to mitigate the potential misuse of our current review process for political gain. The Board and City Clerk will also confer with the City Attorney to ensure our proposed adjustments for the intake process do not violate any due process or open government laws.

## **Community Partnerships**

### **Topic 10: Public Education Campaign**

Recommendation: Direct the City Clerk to work with the Board in developing educational materials and build informal community partnerships for distribution

Discussion: Over the past two years, and extending beyond that, the Board has seen most of its complaints being related to campaign finance violations. We feel that the public has little awareness of the various Chapters within Title 12 that the Board is responsible for enforcing. Title 12 addresses a range of ethics issues including accepting gifts, lobbying disclosures, using public office for prospective employment, nepotism, and other issues. The Board would like to collaborate with the City Clerk to compile marketing materials to raise awareness of the Board's jurisdiction. These

materials can be placed in public facilities, such as community centers and libraries, as well as distributed to local community organizations such as the chamber of commerce, nonprofit community, and other relevant community agencies.

### **Regulating the Distribution of Arena Tickets**

#### **Topic 11: Distribution of Arena Tickets**

Recommendation: Amend Council Policy 9-11 and Title 12 to include ticket distribution under the purview of the Board and require quarterly reports to the Board on trends in ticket distribution.

Discussion: Under State law, tickets to events are considered reportable gifts; however, FPPC Regulation 18944.1 allows exceptions to this law for tickets that are received by a public official for the purpose of distribution if that local agency's legislative body has adopted a written policy identifying a public purpose served in the distribution of its tickets and public officials disclose their acceptance and use of such tickets. The FPPC does not actively review compliance with these local policies.

In October 2016, the Bay Area News Group published an analysis evaluating compliance with such a ticket distribution policy for local governments involved in the ownership and management of Oracle Arena and Oakland Coliseum. This includes the City of Oakland, the County of Alameda, and their Joint Powers Authority used to manage these facilities. The investigation ultimately pointed out that over the course of three years, tickets were distributed to reward community groups and individuals only 24 percent of the time, while at least 56 percent were used to reward government employees, and many tickets were difficult to determine how they were used due to incomplete disclosure forms. In addition, several public officials from these agencies regularly claimed tickets for sporting events and concerts for personal use and for distribution to campaign donors and campaign staffers. After conducting a review of the City of Oakland's ticket distribution policy, the Oakland Public Ethics Commission pushed a report in April 2017 recommending several revisions to the ticket program, including better oversight and reporting of the ticket program monitored under the purview of the Public Ethics Commission.

While such controversy has not been reported on here in San Jose, the same potential issues exist. Oversight of the City's ticket program has not been assigned to any particular enforcement body to regularly ensure that the City's distribution of gifted arena tickets is serving a public purpose. We recommend amending Council Policy 9-11 and Title 12 of the Ordinance Code to assign the Board the responsibility of enforcing compliance with the City's ticket distribution policy.

### **Establishing Independence and Obtaining Adequate Resources**

#### **Topics 4 and 5: Removing References to "Ethics Commission" and "Elections Commission" in Title 12 and Resolution 77879**

Recommendation: Rename our Board to the Ethics Commission and amend Title 12 and Resolution 77879 to make references consistent.

Discussion: Over the course of several years, the oversight body responsible for monitoring and enforcing Title 12 of the Ordinance Code has been subject to name changes by the City Council. City Clerk staff included this topic as a part of our biennial review as there are still many references in Title 12 and Resolution 77879 referring to the Ethics Commission and Elections Commission. Although we understand the City Clerk's request to clean up references based on the City Council's decision to change our name, we are once again requesting as a part of the biennial ethics review for the City Council to revert out title back to the Ethics Commission.

Of the 50 states in our country, 42 states (84%) maintain statewide oversight bodies that enforce campaign finance and ethics laws. Of these 42 states, 35 states (70%) use the term “ethics” in titling their oversight bodies. Within California, the four other cities that have adopted and enforce their own range of campaign finance and ethics laws refer to their oversight bodies as ethics commissions (San Francisco Ethics Commission, Oakland Public Ethics Commission, Los Angeles Ethics Commission, and San Diego Ethics Commission).

Aside from conforming to the industry, it is important that our name is consistent with our mission and jurisdiction. As we discuss in the introduction of this memo, this biennial ethics review stems from Section 607 of the City Charter, which itself is titled “Code of Ethics,” and consistently refers to the City’s set of laws addressing campaign finance, lobbying, gifts, and conflicts of interest as ethics laws. This is also reflected in Title 12 by the fact that its title is “Ethics and Open Government Provisions,” and the very first requirement under this Title states, “This title is intended to implement Charter Section 607. It is a compilation of all city ordinances which directly regular campaign conduct and ethics.” (Section 12.02.010)

We recommend changing our name back to the Ethics Commission so that we conform with the industry, truly reflect our mission and jurisdiction, and demonstrate the independence that we are supposed to have without have having to worry about our name and authority changed every time a politically sensitive issue becomes publicized.

### **Topic 12: Charter Protection and Minimum Resources and Staffing**

Recommendation: The City Council should sponsor a ballot measure amending Section 607 of the City Charter so that the renamed Ethics Commission’s title, authority, and existence are better protected from the volatility of elections, campaigns, and political conjecture.

Discussion: As discussion on the last topic, the Board has noticed its authority subject to change at whim during the course of an election or in reaction to political incidents. Not only do we wish to protect our name and authority in the City Charter, we would like to require the City Council to commit a reasonable minimum level of staffing and funding to fulfill our mission.

Ordinance Code Section 12.04.070 assigns the Board the responsibility to “monitor compliance with all campaign and ethics ordinances.” Federal standards for internal control in a government agency (*U.S. Government Accountability Office Standards for Internal Control*) dictate that an effective internal control system is one in which management monitors the internal control system through ongoing monitoring and separate evaluations, evaluations being audits or other system tests. Although Title 12 establishes our City’s campaign and ethics laws, the Board’s ability to enforce these laws relies primarily on a reactive complaint system. Since the Board has not been appropriated support staff beyond administrative and legal support it receives from the Offices of the City Clerk and City Attorney, we do not have the necessary resources to effectively monitor compliance with our laws through audits.

Recent events in the County of Contra Costa also demonstrate the inherent risk in our ethics laws that rely primarily on an honor code of compliance. In June 2017, the Contra Costa District Attorney resigned from office after pleading guilty to a felony perjury charge for illegally spending over \$66,000 in campaign funds for personal use. The only reason this abuse came to light was due to a periodic audit of campaign funds by the California Franchise Tax Board, as the 600 transactions made from 2011 through 2015 had not been reported in the individual’s campaign disclosure statements.

In order to fulfill our responsibility as dictated in Section 12.04.070, we recommend that the City Council direct the City administration to evaluate options for providing the Board with adequate staffing and resources to carry out an independent audit function.

Thank you for supporting the Board of Fair Campaign and Political Practices and our common goal of making our City more transparent and accountable to the public. Please do not hesitate to contact me if we can provide additional information about our recommendations.

A handwritten signature in black ink that reads "Adrian Gonzales". The signature is written in a cursive style with a small dot above the 'i' in "Adrian".

ADRIAN G. GONZALES, Chair  
City of San José  
Board of Fair Campaign and Political Practices

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