



**Governance Committee**

**Item IV-A**

**January 23, 2014**

**Review of Resolutions and Governance Documents**

## Resolutions Review Update

1. The online WMATA Resolution Database, <http://www.amlegal.com/library/dc/wmata.shtml>, organizes all resolutions by subject matter. Thus, a user can browse resolutions topically as well as search by resolution number, date or full text.
2. Database also provides a summary of resolutions within each topic.
3. Database denotes explicitly superseded resolutions with a watermark, links to current resolutions (and back) and provides reference tables and links.
4. Committee directed staff to categorize the resolutions by Board Committee so that each Committee could review for potential policy issues. Organizing resolutions by Board Committee areas of responsibility results in the following:
  - Audits & Investigations, 150 resolutions
  - Customer Service & Operations, 2200
  - Finance & Administration, 2500
  - Governance, 400
  - Planning, Program Development & Real Estate, 200
  - Safety & Security, 200

## Review of Governance Documents

At the request of the Governance Committee, staff annually reviews the Board Bylaws, Procedures and Code of Ethics for potential clarification, update and improvement. We present the results of our review early in the year for the Governance Committee's consideration. For 2014, the Executive Committee requested we pay particular attention to detailing processes required by the Code of Ethics. Paragraphs 1-7 take one such process at a time and present an outline for discussion. In addition, we offer for discussion some models defining when there is an apparent conflict under the Code of Ethics (paragraph 8). We also provide a draft for Board-General Counsel communication, and changes to the Audits & Investigations Committee provision in the Bylaws.

### CODE OF ETHICS PROCESS

1. The Code of Ethics should detail the process of making and reviewing Board Member disclosures. The processes should memorialize current practice, which seeks timely and consistent reporting and resolution of potential conflicts. Staff prepared the following outline for discussion:

## January 23, 2014 Governance Meeting

### Board Member Disclosures of Potential Prohibited Conflicts

- a) Define Potential Prohibited Conflict as a possible actual or apparent conflict arising under Code of Ethics Article III.
  - b) Clarify that the Code requires updates to Board Member disclosures within 30 days of becoming aware of a Potential Prohibited Conflict.
  - c) The Board Secretary will review submitted disclosures for completeness and forward them to the Ethics Officer for a determination of whether the disclosure presents a Prohibited Conflict.
  - d) If the Ethics Officer determines a Prohibited Conflict exists, the Ethics Officer will so notify the Board Member and allow the Board Member x business days to resolve the Prohibited Conflict.
  - e) If the Prohibited Conflict is timely resolved or if there are no conflicts, the Ethics Officer will return the disclosure form to the Board Secretary who will maintain the form in the public files of the Authority.
  - f) If a Prohibited Conflict remains unresolved after x business days, plus any extension granted by the Ethics Officer, the Ethics Officer will forward the form for review by the Ethics Committee.
2. Next, the Code of Ethics and Joint Development Policies Code of Ethics provide for others to report potential conflicts and suspected ethics violations of Board Members. To develop a process, staff prepared the following outline of current practice for discussion:

### Reports of Potential Prohibited Conflicts and Ethics Violations

- a) The Code of Ethics and WMATA Joint Development Policies and Guidelines require Parties to disclose Board Member interests, as well as report suspected violations of the WMATA Code of Ethics and Potential Prohibited Conflicts.
- b) Reports of Suspected Violations: 1. must be made in writing, 2. must involve conduct in the capacity as a member of the WMATA Board, and 3. should be materially related to a violation of the Code of Ethics, law, rule, regulation or duty, as opposed to a complaint about a policy or a matter of judgment.
- c) If a third party discloses that an interest has been conveyed to a Board Member in excess of \$x within y days of considering a matter involving

## January 23, 2014 Governance Meeting

that party, it will be deemed a Prohibited Conflict for that Board Member, which must be cured.

- d) All such disclosures and reports will be submitted to the Ethics Officer and may be made anonymously. If the Ethics Officer determines that the report represents a violation or Prohibited Conflict, the Ethics Officer will attempt to resolve it consistent with the process described in Board Member disclosures. If the violation or Prohibited Conflict remains unresolved, it will be addressed through the Ethics Committee process.

3. The next outline set out how Prohibited Conflicts may be cured, which staff has prepared based on current practices, the practices of local Boards (WASA, MWAA) and other transit agencies (LACMTA):

### Methods to Cure Prohibited Conflicts

- a) A Board Member may remedy Prohibited Conflicts and suspected violations ("cure") at any time prior to an Ethics Committee recommendation on the matter. The Ethics Officer must concur that the method cures the Prohibited Conflict or suspected violation.
- b) Recusal. Board Members may recuse themselves from Participating in any matter in which they have a Prohibited Conflict, or when Participating would otherwise violate the Code of Ethics or law. A Board Member will promptly notify the Board or Committee Chair before whom the matter is being considered of the decision to recuse using the form attached to the Code of Ethics. The Board Member will also cause the Board's official records to reflect the Member's recusal from Participating in the matter. The fact of the conflict and recusal shall be publicly announced at any meeting of the Board or a Committee at which the matter is considered.
- c) Divestiture of funds. Upon the sale or other divestiture of the asset or other interest that creates a Prohibited Conflict in a particular matter the Board Member will no longer be disqualified from Participating in the matter.
- d) Declaration. If a Board Member believes, and the Board concurs, that he or she is able to Participate in a matter fairly and objectively in the interests of WMATA notwithstanding the existence of an apparent conflict of interest, the Member may Participate in a matter after making a Declaration. The Declaration will be made on the form

## January 23, 2014 Governance Meeting

attached to the Code of Ethics and processed consistent with Board Member Disclosures. The Declaration will include: 1. the nature of the Member's interest in the parties or matter, and 2. that the Member is able to Participate in the matter fairly and objectively in the interest of WMATA. The Chair will read the Declaration into the record at any meeting of the Board or Committee at which the matter is considered.

4. The next outline details non-participation during recusal, also based on current practices and the practices of other transit properties:

### Board Member Participation

- a) Board Members will not Participate in any matter from which they are recused or in any matter involving an unresolved conflict or suspected violation on behalf of the Member.
  - b) Unless otherwise directed by the Chair, a recused Member may remain present for any public portion of the consideration of the matter, provided the Member does not remain at the Board or Committee table or dais during the discussion and consideration.
  - c) Nothing prohibits a Board Member from Participating in a matter if that Participation is legally required in order for the decision to be made. In that case, the Board Member will make a Declaration as provided for in this section. For purposes of this paragraph, the fact that a Board Member's vote is necessary to break a tie does not make the Member's Participation legally required.
5. There should also be a process for obtaining and preparing Ethics Opinions, which are provided for in the Code of Ethics. The following outline for discussion includes elements from current practice and from other local Boards:

### Ethics Opinions

- a) Board Members may request a written opinion from the Ethics Officer regarding the application of the Code of Ethics to specific questions or situations that they encounter.
- b) The Chair, First Vice-Chair and Ethics Committee may request an opinion regarding the application of the Code to specific questions or situations regarding other Members that are properly before them.
- c) Requests for written opinions will include a full and accurate disclosure of all material facts.

## January 23, 2014 Governance Meeting

- d) In reviewing disclosure forms or preparing an opinion, the Ethics Officer may conduct whatever investigation of the facts the Officer deems necessary. The subject Board Member will cooperate fully with the investigation.
  - e) If such investigation reveals conduct that may be criminal in nature, the Ethics Officer shall cease investigation of such conduct, report it to the appropriate prosecutor and so advise the Board.
6. The next outline for discussion presents the process of forming an Ethics Committee and how that committee processes matters. It is based on WMATA experience and procedures of other local Boards and transit agencies:

### Ethics Committee Formation and Procedures

- a) The Ethics Committee will hear each matter involving unresolved Prohibited Conflicts, suspected ethics violations, required interpretation of the Code of Ethics for Board Members or any other matter arising under the Code of Ethics for which the Board requires guidance or recommendation ("matter").
- b) The Executive Committee will serve as the Ethics Committee, except that the Board Chair will select a replacement for any member of the Executive Committee that has potential interest in the matter, whose Participation in the matter would create the appearance of a conflict of interest or is unable to fulfill the duties of a member of the Ethics Committee with regard to the matter.
- c) Three members of the Ethics Committee, consisting of at least the one member representing each Signatory and the Committee Chair, constitute a quorum.
- d) Ethics Committee will meet in and follow the procedures for Executive Sessions, except that attendance is limited to the members of the Ethics Committee, the Ethics Officer and persons the Ethics Committee deems necessary for its consideration of the matter.
- e) In considering the matter, the Committee will offer the affected Board Member(s) an opportunity to present written or verbal evidence, either directly or through a representative.
- f) The Ethics Officer will attend the session to provide guidance.
- g) If the matter is not resolved during the Ethics Committee's proceedings, the Ethics Committee may request a formal written

## January 23, 2014 Governance Meeting

opinion from the Ethics Officer and transmit that opinion together with a summary of proceedings for consideration by the Board.

7. When a Prohibited Conflict or violation remains unresolved through the Ethics Committee process, the Board will need to act. The following outline for Board consideration and action upon ethics matters was developed from current practices and the procedures of local Boards and transit agencies.

### Board Action Upon a Matter; Sanctions; Dissolution of Ethics Committee

- a) The Board will consider the matter at a subsequent Board Meeting following its normal procedures.
  - b) The Board may direct further proceedings by the Ethics Committee or request additional guidance from the Ethics Officer.
  - c) The Board will make a written determination, including findings of fact and legal authorities, of whether there is a Prohibited Conflict or other ethics violation. If the Board finds a Prohibited Conflict or other ethics violation, it will order recusal or other cure as well as appropriate sanctions.
  - d) The Board's order of appropriate sanctions may include reprimand, censure, involuntary recusal on the matter and related matters, removal from positions held on Committees, monetary fine and other means selected by the Board.
  - e) The Board's determination will be made part of the public record and be provided to the affected Board Member's appointing authority for appropriate action.
8. The Code states that Members should avoid the appearance of conflicts of interest, and must report apparent conflicts to the Executive Committee. The Code does not provide guidance as to what sorts of situations may create an appearance of a conflict. Models for consideration:
    - a) MWAA: "An apparent conflict of interest arises whenever a Director or [Household Member] has any other personal interest of which the Director is aware that could reasonably appear to conflict with the fair and objective performance of the Director's official duties";
    - b) LAC MTA: "Board members and their staff shall refrain from conduct that they know or reasonably should know is likely to create in the minds of reasonable

## January 23, 2014 Governance Meeting

observers the perception that the board member or staff member used his or her public position improperly.”

9. Once the Committee makes a recommendation regarding revisions to the Code of Ethics and Procedures, staff will revise the Code of Ethics provisions and forms to be consistent with that recommendation.

### GENERAL COUNSEL RELATIONSHIP

1. The Executive Committee wishes to specify the relationship between the Board and the General Counsel, to be characterized by open communication on a regularly scheduled and as-needed basis. Staff prepared the following draft for discussion and potential addition to the Board Procedures:

#### Communication with General Counsel

- a) The General Counsel has a dotted-line reporting relationship with the Board, with primary reporting to the CEO. Notwithstanding this formal reporting relationship, the Board seeks regular and open communication with the General Counsel.
- b) The General Counsel may request a meeting with the Board or appropriate Committee whenever there is an issue that requires immediate consideration.
- c) In addition, the Board will schedule an executive session each quarter for the General Counsel to:
  1. advise the Board on matters as appropriate;
  2. provide status of major litigation and high-profile issues;
  3. discuss upcoming challenges and opportunities;
  4. present any other matters appropriate for executive session.
- d) The Board of Directors or any of its Committees may request a meeting with the General Counsel at any time.

## January 23, 2014 Governance Meeting

### AUDITS and INVESTIGATIONS COMMITTEE CLARIFICATIONS

1. A recent audit suggests changes to the description of the Audits and Investigations Committee in Bylaws Article XII.C:
  - a) Require that a member of the Audits and Investigations Committee has expertise in financial matters. Currently there is no such requirement;
  - b) Require the Audits and Investigations Committee hold more than one public session each year. Currently, the Committee is only required to meet once per year without specifying in open or closed session;
  - c) Require the Audits and Investigations Committee meet at least twice per year with the external auditor (before and after the audit);
  - d) Require the Audits and Investigations Committee meet at least twice per year with the Inspector General.