

***District of Columbia Board of Ethics and Government
Accountability***

Annual Ethical Guidelines Assessment and Recommendations Report

April 17, 2013



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INTRODUCTION AND BACKGROUND

Pursuant to Section 202(b) of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011 (the “Ethics Act”)¹, the Board of Ethics and Government Accountability (the “Board” or “BEGA”) is required to do an assessment of ethical standards for public employees and officials including “a review of national best practices of government ethics law” and provide the Council and/or the Mayor of the District of Columbia “recommendations for amending” the District of Columbia Code of Conduct. The Ethics Act calls for BEGA’s assessment to be done within 240 days of the effective date of the Ethics Act and by the end of each subsequent calendar year. The Board was granted an extension of its deadline to submit this, its first, report.

In determining that it was necessary to pass the Ethics Act, the District of Columbia Council noted recent misconduct allegations involving Members of the Council and the need to restore “the public’s trust in its government.” (D.C. Council Committee on Government Operations Report of December 5, 2011 at p. 2). The Council Committee noted that with regard to the government ethics rules in the District the “problems are myriad and involve fragmented laws, a lack of uniform application” and “outdated laws” among other issues. (*Id.*) The Committee Report noted, for example, that the Code of Conduct for rank and file employees, which sets forth crucial ethical restrictions, is included in the District Personnel Manual (“DPM”). As a result, enforcement of the DPM provisions is left to an employee’s supervisor, no monetary penalties are available and enforcement is inconsistent. Moreover, a comparable mechanism is not in place for elected officials who are really “answerable only to the electorate.” (*Id.* at 9)

To address these and other issues, the Council created an ethics board with independent budget authority through passage of the Ethics Act. The Board appointed a Director of Government Ethics (the “Director”), who oversees the Office of Government Ethics (the “OGE”) staff consisting of both attorneys and investigators. Collectively, the Board, Director and OGE staff will be known as BEGA. Among the problems the Council sought to address by creating BEGA were the lack of a “uniform, comprehensive code of conduct for all employees, including public officials” (*Id.* at 12), lack of meaningful enforcement and penalties (*Id.*) and creation of “an ethical framework” that would “promote a culture of high ethical standards in District government” (*Id.* at 11).

The Ethics Act requires that the Board address in this report eight specific questions. Those questions address whether the District should adopt: 1) local laws similar to federal ethics laws; 2) post-employment restrictions for District employees; 3) ethics laws pertaining to contracting and procurement; 4) nepotism and cronyism prohibitions; 5) criminal penalties for violations of ethics laws; 6) laws empowering BEGA to expel a Member of the Council for certain violations of the Code of Conduct; 7) regulations applicable to campaign contributions from affiliated or subsidiary corporations; and 8) additional ethics laws based on BEGA’s review of national best practices in government ethics law.

¹ Effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-1161.01 *et seq.*) (2012 Supp.)

The Board directed its staff to conduct research and outreach to government ethics experts and organizations, relevant District government officials and the general public for advice and input. The Board also engaged outside *pro bono* legal counsel to assist the staff. On January 10, 2013, the Board held a symposium on best practices in government ethics at which members of the public participated including seven individuals who formally presented their views orally or in writing.

In this report, the Board makes 16 specific recommendations which it encourages the Council and/or the Mayor to adopt. In some areas, the Board believes that it would be more prudent to recommend that no action be taken at this time so that BEGA may revisit those areas in future annual reports as it gains insight and enforcement experience in the practical application of the Code of Conduct.

Acknowledgements

The Board and the Office of Government Ethics (OGE) staff would like to extend their thanks to *pro bono* outside counsel, Thorn Pozen and Bernadette Sargeant, and to Yancey W. Burns, *pro bono* attorney, for their assistance in producing this report.

Thorn Pozen, currently an attorney in private practice in the District, has more than 20 years of experience working with and for the District government. Mr. Pozen previously served as the D.C. government chief ethics counselor and chief FOIA officer, Special Counsel for the D.C. government, and was Chief of Staff and Counsel to a D.C. Councilmember. During his work in government, Mr. Pozen provided legal counsel to various D.C. government officials and advised on government legal issues including government ethics, government structure and power, legislative and regulatory process, information sharing, public safety, campaign finance and Hatch Act coverage, real estate and land use, intellectual property, transportation, appropriations, technology, human resources, fundraising, and on interaction with private organizations and with the federal government. Mr. Pozen also previously worked on the staff of the D.C. Financial Control Board.

Ms. Sargeant, an attorney in private practice, previously served as counsel in the Department of Justice's Office of Professional Responsibility and as counsel to the Ethics Committee of the U.S. House of Representatives. In her position with the Ethics Committee, Ms. Sargeant served as investigative counsel in various matters and also provided ethics advice, counseling and training to Members and staff of the House of Representatives. Ms. Sargeant also served as an Assistant United States Attorney in the District of Columbia for seven years, during which time she gained significant jury trial and appellate experience representing the government as a prosecutor and in civil litigation.

Mr. Burns graduated *cum laude* from the University of the District of Columbia David A. Clarke School of Law, where he was a Dean's Fellow and an Associate Editor of the Law Review. Following law school, he accepted the Capital City Fellowship, where he served in the Office of Property Management, the Office of the Deputy Mayor for Planning and Economic Development, Serve DC – The Mayor's Office on Volunteerism, and the Department of Real

Estate Services. In his final Fellowship rotation, he served as Executive Manager of the DC Environmental Learning Center, a joint initiative of the City Administrator, the Department of Real Estate Services, the Department of Parks and Recreation, the Department of the Environment, and the Department of Youth Rehabilitation Services. Mr. Burns served as a *pro bono* attorney for the Board of Ethics and Government Accountability prior to being hired by the Board as an Attorney-Advisor for BEGA.

##

EXECUTIVE SUMMARY

Pursuant to Section 202(b) of the Ethics Act, BEGA is required to produce this report addressing eight questions relevant to whether and how the District should modify its existing Code of Conduct for District government employees and elected officials. Those eight questions address whether the District should: 1) adopt local laws similar in nature to federal ethics laws; 2) adopt post-employment restrictions; 3) adopt ethics laws pertaining to contracting and procurement; 4) adopt nepotism and cronyism prohibitions; 5) criminalize violations of ethics laws; 6) give BEGA authority to expel a Member of the Council for certain violations of the Code of Conduct; 7) regulate campaign contributions from affiliated or subsidiary corporations; and 8) enact any other modifications to its existing Code of Conduct. After research regarding government ethics issues, review of state, local and federal government ethics laws and consideration of input from the public, BEGA has made specific recommendations, including some recommendations that action on certain aspects of the questions addressed be deferred.

Questions 1 and 2: Adoption of local laws similar in nature to federal ethics laws and post-employment restrictions - - BEGA recommends that the District's Code of Conduct formally adopt the ethical standards in the federal laws listed in section 18 of the "Sources" to this report, which already apply to District employees. This will give BEGA authority to enforce those standards itself through imposition of civil and/or administrative penalties. Specifically, BEGA recommends substituting appropriately applicable post-employment restrictions set forth in 18 U.S. Code Section 207 for the post-employment restrictions on District employees now set forth in Section 1814 of the District Personnel Manual ("DPM").

Question 3: Adoption of ethics laws pertaining to contracting and procurement - - BEGA recommends that it be granted authority to investigate allegations of and enforce penalties for violations of ethical standards related to contracting and procurement and that such ethical standards be made part of the Code of Conduct for District employees and elected officials. BEGA will need additional time to continue researching best practices in order to craft specific provisions for enforcement of ethical standards in the context of contracting and procurement.

Question 4: Nepotism and cronyism prohibitions - - D.C. Official Code §1-618.04 currently sets forth nepotism prohibitions and relevant definitions. BEGA recommends including those prohibitions in the District Code of Conduct and giving BEGA the authority to investigate alleged violations and to impose civil or administrative penalties for established violations. In addition to including the federal nepotism statute in the District's Code of Conduct (see above, questions 1 and 2), BEGA recommends that the Council consider expanding nepotism prohibitions, as has been done in other jurisdictions, to include indirect action that creates the appearance of a nepotism based conflict of interest. BEGA also recommends that the Council consider adopting a broader definition of relative under the nepotism law to include romantic and cohabitant relationships and stating explicitly that foster children and domestic partners are covered under the existing definition of relative in the statute.

BEGA recommends that it be allowed additional time to research and consider how best to directly address cronyism concerns without creating an undesirable negative impact on productive networking that benefits the District government. BEGA expects that expanding the

definition of relative and including a prohibition on indirect action creating an appearance of nepotism related conflict of interest will address some concerns related to cronyism.

Question 5: Criminalization of ethics laws - - BEGA recommends that the Council criminalize the conflict of interest violations in Section 223 of the Ethics Act and the contingent fee provisions in D.C. Official Code § 2-354.16. BEGA also recommends that the Ethics Act be modified so that the Board is able to both levy its own penalty and refer the same matter to the D.C. Office of the Attorney General (OAG) or the U.S. Attorney's Office for the District of Columbia for prosecution.

Question 6: Whether BEGA should be able to expel a Councilmember upon a finding of certain ethics violations - - BEGA recommends that the Council should be able to expel a Member based on a finding by BEGA of certain ethics violations. BEGA recommends against having the power to expel reside with the BEGA. BEGA recommends that Section 222 of the Ethics Act be amended to add a subsection (c) providing that the Board may upon a finding of a severe threat to the public trust recommend in its censure of a Member of the Council that the Council act to expel that Member. BEGA recommends that a new subsection (d) be added to Section 222 of the Ethics Act to provide that the Board's recommendation regarding expulsion of a Member be afforded great weight by the Council.

Question 7: Whether the District should regulate campaign contributions from affiliated or subsidiary corporations - - The Council has campaign finance bills pending before it. Ethical standards applicable to the issue of campaign finance require that the Council consider those bills noting that campaign contributions must never be used for personal gain, political donors may never be allowed to exert more influence than others and that openness and transparency must be mandatory in all matters related to campaign finance. While the Council considers the pending bills, BEGA will continue its review with the goal of presenting any specific proposed changes in future years if needed.

Question 8: Whether any additional recommendations are warranted - - BEGA makes the following additional recommendations:

- BEGA recommends that it be allowed to draft a Universal Code of Conduct in order to make clear that the Code of Conduct applies to all subordinate and independent District agency employees, all Council staff, all Advisory Neighborhood Commissioners, members of District Boards and Commissions and all elected officials to allow for all Code provisions to be in one place;

- that the current 14-day deadline for the Director to present evidence concerning a complaint to the Board be extended to 30 business days;

- that Section 221 (a) (5) (A) be modified to make clear that the civil penalty of a fine imposed by BEGA can be enforced through issuance of a D.C. Superior Court order of civil contempt against a party who fails to pay the fine ordered by BEGA;

- that the Ethics Act be amended to state explicitly that BEGA must be given access to records and facilities of the District government in order to fulfill its statutory obligation to conduct investigations;

- that the Ethics Act be amended to state explicitly that all District government employees and officials are required to cooperate with BEGA in any investigation, negotiated disposition, enforcement proceeding, and/or the provision of advice. BEGA recommends that a similar requirement be imposed on contractors/vendors as a condition of their contracting agreements with the District;

- that the Ethics Act be amended to include a requirement that District employees and officials have an affirmative duty to report known violations of the Ethics Act or violations that reasonably should have been known without undue delay;

- that the Ethics Act be amended to make clear that the “safe harbor” from future BEGA enforcement action for an individual who relied in good faith on an advisory opinion provided by the Director applies only to opinions rendered by the Director as opposed to opinions provided by designated agency ethics officials;

- that financial disclosure requirements be modified such that filers are required to: identify clients that have dealings with the District government; name the District agency with which the filer’s clients do business; provide the title of any pending legislation from which the client stands to gain a direct financial benefit; disclose honoraria paid to a charitable organization on behalf of or in the filer’s name; and identify persons or entities that give money to a charitable organization with which the filer is associated. All of these requirements would apply to the filer’s own clients as well as clients of the filer’s spouse, domestic partner or dependent children;

- that BEGA take additional time to review gift rules in other jurisdictions to determine what if any specific recommendations to make regarding the modification of the District’s gift rules; and

- that the Code of Conduct include an explicit prohibition against the use of public office or employment for private gain regardless of whether that personal gain involves financial gain.

#

ETHICAL GUIDELINES ASSESSMENT AND RECOMMENDATIONS

As provided in the Ethics Act, BEGA has focused on making recommendations pertaining to the following eight questions:

1. Should the District Adopt Local Laws Similar in Nature to Federal Ethics Laws?

RECOMMENDATION – BEGA recommends that the standards in the federal laws included in section 18 of the “Sources” to this report which are applicable to District employees be formally adopted into the Code of Conduct so that BEGA may civilly and/or administratively enforce those standards locally.²

A list of applicable federal laws is currently referenced in the Code of Conduct but the language of those statutes is not formally part of the Code. As a result, BEGA does not currently have the authority to enforce the substance of these federal provisions. Among the reasons the Council should adopt provisions in the Code of Conduct taken from the federal ethics laws cited in section 18 of the “Sources” to this report are:

- BEGA would be able to investigate and enforce through civil and/or administrative penalties ethics violations by District employees that currently could only be enforced by the federal government. Currently, a violation by a District government employee of any of the provisions of the laws listed in section 18 of the “Sources” to this report may be prosecuted only by the federal government. By formally incorporating the federal standards into the Code, under Sec. 202(a) of the Ethics Act, BEGA would be able to enforce those standards as well. BEGA seeks here only the ability to enforce those standards civilly and/or administratively, so for purposes of incorporation into the Code, the penalty provisions would need to be amended accordingly. BEGA then will be empowered to investigate allegations of ethical impropriety now covered only by federal law and impose sanctions if it finds violations of those laws.

- By using the exact language in the federal statutes in the Code of Conduct, it will be clear that federal case law and interpretive opinions will apply to District employees. This will allow for clearer precedent and more consistent and predictable enforcement.

- Incorporation of the federal rules into the Code will bring the District one step closer to a single, Universal Code of Conduct applicable to all District employees, rather than the multiple sets of restrictions that now apply.

² Those federal laws are: 5 U.S.C. § 3110 (nepotism); 5 U.S.C. § 4111 (acceptance of training, travel reimbursement from non-profits); 5 U.S.C. § 5531-38 (dual pay - federal & District governments); 5 U.S.C. § 7342 (Foreign Gifts); 18 U.S.C. § 200 (aiding and abetting); 18 U.S.C. § 201 (bribes, illegal gratuities); 18 U.S.C. § 202 (definitions); 18 U.S.C. § 203 (compensation for representation in claims against the government); 18 U.S.C. § 205 (serving as agent/attorney in claims against the government); 18 U.S.C. § 207 (post-employment restrictions on former officers, employees and elected officials of the executive and legislative branches); 18 U.S.C. § 208 (financial conflicts of interest); 18 U.S.C. § 209 (compensation for performance of official duties); 18 U.S.C. § 216 (civil & criminal penalties); 18 U.S.C. § 219 (foreign agents); 18 U.S.C. § 601 (deprivation of employment); 18 U.S.C. § 602 (solicitation of political contributions); 18 U.S.C. § 610 (coerced political activity); and 18 U.S.C. § 1913 (lobbying).

· As noted, the Ethics Act requires that BEGA review best practices in government ethics law annually and report in a timely manner to the Council. Through that process, both BEGA and the Council will have the ability to monitor future changes to federal ethics law and rule, to ensure that any changes to the federal rules that are incorporated into the Code of Conduct are still appropriate for the District, and if not, to change the Code accordingly.

2. Should the District Adopt Post-Employment Restrictions?

RECOMMENDATION – BEGA recommends substituting appropriately applicable post-employment restrictions contained in 18 USC Section 207 (amended to provide for only civil and/or administrative penalties) for the standards currently in Section 1814 of the District's Personnel Manual (DPM).

Almost all District employees are currently covered by two sets of post-employment restrictions. District employees now under the purview of Chapter 18 of the DPM (6B18 DCMR 1800 et seq.) are subject to the post-employment restrictions in Section 1814 of the DPM and the federal restrictions in 18 USC § 207.³ Coverage under the DPM includes all District employees except some in independent agencies excluded by the District's Comprehensive Merit Personnel Act (D.C. Law 2-139, D.C. Official Code § 1-601.01 et seq. ("CMPA")). The restrictions in the DPM and 18 USC § 207 are similar but are not identical. This lack of harmony in the rules has caused a lack of clarity for both those charged with enforcement and for the District employees required to comply.

3. Should the District Adopt Ethics Laws Pertaining to Contracting and Procurement?

RECOMMENDATIONS – BEGA believes it should have the authority to investigate allegations and enforce penalties for violations of contracting and procurement laws and for those provisions to be made part of the Code of Conduct. BEGA requests the opportunity to continue its research regarding whether and how other jurisdictions provide for the enforcement of ethics laws as part of their own legal provisions regarding state and local government contracting and procurement.

Until BEGA's research is complete and specific recommendations are made in a future report, BEGA recommends that determinations of suspension, debarment, or contract termination remain in place and that the Council continue with its ongoing deliberations concerning possible legislation to enact a more comprehensive contracting and procurement reform program, and that any future proposals for reform include BEGA as the enforcement body for those who violate the procurement statutes.

Because the authority requested by BEGA or enacted by the Council in the future would result in a large undertaking for a small body, BEGA would request additional resources in order to successfully complete the task. These resources could include for example

³ For Councilmembers and employees of the Council, the Code of Official Conduct for Council Period 19 also contains post-employment restrictions similar to those contained in the DPM.

detailees to BEGA from within the District government and or outside contractors to support the BEGA.

Government contracting and procurement services in the District are overseen by the Office of Contracts and Procurement (“OCP”) and its review board, the Contracts Appeals Board (“CAB”). OCP works with vendors and District agencies to purchase quality goods and services in a timely manner and at a reasonable cost while ensuring that all procurement and contracting is conducted fairly and impartially. CAB provides an impartial, expeditious, inexpensive, and knowledgeable forum for hearing and resolving contractual disputes and protests involving the District and outside contractors. OCP’s Office of Procurement Integrity and Compliance (“OPIC”) is the audit, review, and compliance arm of OCP. OPIC ensures that the procurement process and the law are being followed and that the District is actually receiving the goods and services for which it pays.

Major violations of procurement laws may result in debarment or suspension by the Director of OCP (known as the Chief Procurement Officer or “CPO”) under D.C. Official Code § 2-359.07. Debarred or suspended parties are put the Excluded Parties List⁴. The CPO may also terminate any contract if the contractor has been convicted of a crime related to “the procurement of any work to be done or any payment to be made under the contract” or for any other violation of contracting and procurement laws. *See* D.C. Official Code § 2-359.03. An affected contractor may appeal the CPO’s decision to the CAB and the CAB’s decisions are appealable to the D.C. Court of Appeals (D.C. Official Code §§ 2-360.03 and .05).

In the context of ensuring that ethics laws are enforced as part of policing contracting and procurement practices in local government, local legislatures should “have rules to prevent” circumvention of laws in these areas by not leaving “the selection process . . . [to] an independent agency or public-private partnership that has its own rules and no outside oversight”

⁴ <http://ocp.dc.gov/DC/OCP/c-Library/c-Library+Documents/Excluded+Parties+List>

Under D.C. Official Code § 2-359.07, causes for debarment or suspension include the following:

- (1) Conviction for the commission of a criminal offense incident to obtaining, or attempting to obtain, a public or private contract or subcontract or in the performance of the contract or subcontract;
- (2) Conviction under this chapter or under any other District, federal, or state law for fraud, embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity which currently affects the contractor's responsibility as a District government contractor;
- (3) Conviction under District, federal, or state antitrust laws arising out of the submission of bids or proposals;
- (4) A violation under subchapter I of Chapter 3B of this chapter;
- (5) A false assertion of certified business enterprise status or eligibility as defined in subchapter IX-A of Chapter 2 of this title; or
- (6) A violation of contract provisions, as set forth below, of a character which is regarded by the CPO to be sufficiently serious to justify debarment action:
 - (A) Willful failure, without good cause, to perform in accordance with the specifications or within the time limit provided in the contract; or
 - (B) A recent record of failure to perform or of unsatisfactory performance in accordance with the terms or conditions of one or more contracts; provided, that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor shall not be considered to be bases for debarment; or
- (7) Any other cause the CPO determines to be sufficiently serious and compelling to affect responsibility as a District government contractor, including debarment by another governmental entity for any cause listed in rules.

See Wechsler, Robert, Local Government Ethics Programs: A Resource for Ethics Commission Members, Ethics Reformers, Local Officials, Attorneys, Journalists, and Students. BEGA anticipates that it would seek the authority to enforce, alongside OCP and CAB, the government ethics-related provisions already contained in District contracting and procurement law and to levy additional sanctions where violations are found to have occurred. Although OCP provides some oversight through OPIC, it focuses primarily on conducting audits for compliance, detecting fraud, waste and abuse in procurement operations, assessing operations, and assessing contracting officer's qualifications. There is a lack of focus on ethical issues that arise in the contracting and procurement process. In the District, independent agencies such as the Office of the Chief Financial Officer ("OCFO") and the Office of the Chief Technology Officer ("OCTO") provide their own procurement services and are currently subject to no outside review.

Before making specific recommendations, however, BEGA believes it would be advisable for it to conduct additional research regarding how other state and local jurisdictions handle the enforcement of ethics laws in the context of contracting and procurement. Additional research and review may lead BEGA to recommend that the Council amend the Ethics Act to include in the Code of Conduct D.C. Official Code provisions pertaining to at least the initial stages of contract formation as set forth in D.C. Official Code §§ 2-354.01 - .20. This early stage of the procurement process appears to be the most vulnerable to potential mischief and interference. Currently, this potential problem area is not adequately covered by the existing provisions of the Code of Conduct.⁵

When the final version of the Ethics Act was adopted, the Council included only one procurement provision in the Code of Conduct, the prohibition on forming contingency fee agreements between the District and its contractors found at D.C. Official Code § 2-354.16. Because of the large sums of money involved and the general complexity of the systems at issue, contracting and procurement is a ripe area of risk for government ethics violations. Although the District has a government agency in OCP and CAB serves as a review board, BEGA believes that it also should have a role in assuring government ethics compliance in the area of contracting and procurement.

4. Should the District Adopt Nepotism and Cronyism Prohibitions?

RECOMMENDATIONS - BEGA recommends including the standards found in D.C. Official Code §1-618.04 in the Code of Conduct, thus allowing BEGA to investigate and enforce violations of nepotism prohibitions (concurrent with the District's Department of Human Resources) as potential government ethics infractions and to include the other changes noted in this section.

BEGA recommends that the Council consider legislation similar to that in place in other jurisdictions which would expand nepotism provisions to prohibit indirect action that creates an appearance of nepotism based conflict of interest in employment

⁵ BEGA notes that if the Council amends the Ethics Act to include in the Code of Conduct relevant D.C. Official Code provisions, corresponding changes need to be made to the District's boilerplate contract language to ensure that BEGA's authority to enforce those provisions is part of every contract held by the District.

decisions. BEGA also recommends that the Council consider adopting a broader definition of family member or relative similar to the definition in place in the City of Oakland, California which defines “relative” to include romantic and cohabitant relationships as a way of addressing concerns about both nepotism and cronyism. BEGA also recommends including language in the current definition of relative to make clear that foster children and domestic partners are included in the definition.

BEGA recommends against allowing nepotism waivers.

Nepotism

Prohibitions on nepotism in District government are already governed by federal law and the D.C. Official Code. Under 5 U.S.C. § 3110, District government employees cannot hire, promote or influence a decision to hire, or advocate for the hiring, appointment or promotion of a relative. 5 U.S.C. § 3110 (a)(3) defines “relative” as a father, mother, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, husband, wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half-brother, or half-sister.

Last year, D.C. Council legislation went into effect which specifically prohibited nepotism in District government hiring (D.C. Law 19-115, the “District of Columbia Government Comprehensive Merit Personnel Amendment Act of 2012”) (D.C. Official Code § 1-618.04). D.C. Official Code § 1-618.04, largely mirrors 5 U.S.C. § 3110, including in its definition of a relative for purposes of the nepotism prohibitions. However, §1-618.04 provides a remedy to the District government that is not available in 5 U.S.C. 3110, by requiring an employee who violates the nepotism prohibition to “reimburse the District for any funds paid” to the employee’s relative “as a result of the [relative’s] appointment, employment, promotion or advancement.” See D.C. Official Code §1-618.04 (2)(a). Section 1-618.04 (2) (a) does not have language explicitly including foster children and domestic partners as covered in the definition of relative. Such additional language would be a useful clarification in order to avoid unnecessary controversy in the future.

Some jurisdictions, such as New York State, provide general ethical considerations that prohibit nepotism related conflicts of interest. New York State Public Officers Law, Article 4, § 74(3)(f)⁶ provides that –

An officer or employee of a state agency . . . should not by his conduct give reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is affected by the kinship, rank, position or influence of any party or person. (Emphasis added)

The provision prohibits both an actual conflict of interest related to nepotism as well as the appearance of a nepotism related conflict of interest. At times, situations arise in the District which raise the issue of whether indirect pressure motivated by nepotism has been brought to bear on an employment decision. These situations present the appearance of a nepotism related

⁶ <http://www.jcope.ny.gov/about/ethc/PUBLIC%20OFFICERS%20LAW%2074.pdf>

conflict of interest. BEGA therefore recommends that the Council consider legislation that would include a provision similar to the one in place in New York prohibiting the appearance of a nepotism related conflict of interest.

A number of jurisdictions provide for waivers which can be used to avoid violation of nepotism prohibitions.⁷ BEGA recommends against providing for nepotism waivers because they open the door to the wholesale gutting of an ethics code, encourage political pressure on ethics commissions by individuals and groups within the community and lead to charges of partiality, all of which undercut the perception of the ethics commission as an impartial body of high integrity.⁸

Cronyism

A related issue that neither 5 U.S.C. § 3110 nor D.C. Official Code §1-618.04 addresses is cronyism, which is generally understood to mean the hiring of friends, supporters, and their families. Indirect nepotism can be a common aspect of cronyism which “creates just as serious an appearance of impropriety (and anger among citizens), as well as, in many cases, discrimination” that is nevertheless “hard to prevent through ethics codes.”⁹

Cronyism is difficult to address and there is a dearth of statutes dealing with the issue. One of the few jurisdictions that has enacted legislation to deal with cronyism is the City of Oakland, California. Oakland defines cronyism as “participating in any employment decision that may be viewed as a conflict of interest, such as one involving a close friend, a business

⁷ The City of Denver, Colorado’s laws, for example, provide for allowance of a waiver under three circumstances:

- (1) The relative who was proposed to be hired was certified through a competitive process conducted pursuant to law, and the officer, official, or employee who would make the appointment did not influence or affect the certification.
- (2) The officer, official, or employee who would officially make the appointment is acting ministerially and did not select the relative or attempt to influence the person who did.
- (3) The relative who would be in the line of supervision was already working in the agency before the officer, official, or employee came into the line of supervision, and the officer, official, or employee can and will abstain from participating in any personnel actions involving the relative.

As government ethics scholar Robert Wechsler has observed,:

“These reasons sound good and fair, but they do not take into account the appearance of impropriety. Nor are they very realistic. Certification is only one factor in hiring, what is necessary to apply for a position in the first place. Rarely is hiring a ministerial act, and there is no way to know whether an official has attempted to influence someone who hires her relative. And it is impossible for an ethics commission to monitor an official’s participation, directly or indirectly, in personnel actions involving a relative.” See Wechsler, Robert. *Local Government Ethics Programs: A Resource for Ethics Commission Members, Ethics Reformers, Local Officials, Attorneys, Journalists, and Students*, 2012. at 228. <http://www.cityethics.org/files/lgep1-0%20-%20Robert%20Wechsler.pdf>

⁸ Wechsler, Robert. *Local Government Ethics Programs: A Resource for Ethics Commission Members, Ethics Reformers, Local Officials, Attorneys, Journalists, and Students*, 2012. at 228. <http://www.cityethics.org/files/lgep1-0%20-%20Robert%20Wechsler.pdf>

⁹ *Id.*

partner, and/or professional, political, or commercial relationship” leading to “preferential treatment” or compromising “the appearance of fairness.”¹⁰

The City of Oakland seeks to prevent cronyism by prohibiting participation or use of influence in hiring and or in setting or changing terms and conditions of employment. The Oakland Municipal Code provides that no city “official, manager or employee may engage in cronyism and/or attempt to influence” city officials or employees “to hire, promote, or change the terms and conditions of employment of any individual with whom that person has a family relationship, consensual romantic relationship or cohabitant relationship.” See Title 2, Chapter 2.40 of the Oakland Municipal Code § 2.40.060. This language combines a prohibition against cronyism with one against nepotism. Unfortunately, the Oakland prohibition also runs the risk of inhibiting beneficial professional networking which can be of great value.

One aspect of the Oakland nepotism/cronyism statute that could be beneficial to the District, however, is its broad definition of relative and its inclusion of language prohibiting the appearance of nepotism or favoritism caused by cronyism. The Oakland Municipal Code defines a “family relationship” to include a “relationship by blood, adoption, marriage, domestic partnership, foster care and cohabitation” to include foster children and spouses or domestic partners as well as “a consensual romantic relationship.” See Title 2, Chapter 2.40 § 2.40.010

At this time, BEGA has no specific recommendations to address the issue of cronyism beyond the expansion of the definition of relative or family member and the inclusion of related appearance of conflict of interest provisions. If after further research and practical experience with investigation and enforcement of ethics violations BEGA can make additional specific recommendations relevant to addressing cronyism, it will do so in future reports.

5. Should the District Criminalize Violations of Ethics Laws?

RECOMMENDATIONS – BEGA recommends that the Council criminalize the conflict of interest violations contained in the Ethics Act (Section 223) and the contingent fees provision of D.C. Official Code § 2-354.16. BEGA also recommends that Section 215 of the Ethics Act be changed so that the Board, after presentation of evidence in an open and adversarial hearing, may both levy a penalty in accordance with Section 221 and refer the matter to the OAG (or the United States Attorney for the District of Columbia) for enforcement or prosecution. BEGA further recommends that it be within the Board’s discretion to include its agreement not to refer a matter for criminal prosecution as a term of the negotiated resolution of any matter before it.

Under Section 221(b) (1) of the Ethics Act, the OAG is empowered to criminally prosecute violations of the Code “that substantially threaten . . . the public trust.” The Ethics Act does not list the specific provisions in the Code that substantially threaten the public trust.

¹⁰ Title 2, Chapter 2.40 of the Oakland Municipal Code §2.40.010
<http://library.municode.com/index.aspx?clientId=16308&stateId=5&stateName=California>

BEGA reviewed the ethics codes of several other jurisdictions to determine which provisions of the Code of Conduct should be recommended for the addition of criminal penalties.

BEGA's counterpart agency in New York City, the New York City Conflicts of Interest Board ("COIB"), is governed by Chapter 68 of the New York City Charter. Chapter 68 § 2602(c) provides that attempts to influence proposed legislation without public disclosure of financial interests in the legislation be punishable as a misdemeanor in addition to other penalties related to the violator's ability to hold public office in the city. Similarly, San Francisco's Campaign and Governmental Conduct Code, which includes criminal penalties, provides that the knowing and willful violation of the city's conflict of interest and ethics laws is punishable as a misdemeanor and subject to monetary fines.¹¹ The San Francisco ethics laws that are subject to these criminal penalties include: financial conflicts of interest (§ 3.206), decisions involving family members (§ 3.212), gifts (§ 3.216), disclosure of confidential information (§ 3.228), and filing false charges (§ 3.238). Kansas has a state ethics code that criminalizes some, but not all, of the conduct contained within its ethics code. (K.S.A.) Chapter 46, Article 2. K.S.A. 46-276, provides that violations of certain enumerated provisions of Chapter 46, Article 2, are classified as class B misdemeanors. Two of the Kansas provisions which are comparable to provisions in the District's Code of Conduct and which are classified as crimes include disclosure or use of confidential information (K.S.A. 46-241) and "participation . . . in licensure, regulation or in any contract with any organization" in which a state official or employee "holds a position." (K.S.A. 46-286).

The United States Code contains a number of conflicts of interest provisions which are classified as crimes punishable by up to one year of imprisonment and/or a fine. (18 U.S.C. § 216(a) (1)). Willful violations of covered conflict of interest provisions are punishable as felonies pursuant to 18 U.S.C. § 216(a)(2). The conflicts of interest provisions that are classified as crimes cover various types of conduct including, for example, an elected official's demanding or accepting compensation for the performance of representational duties (18 U.S.C. § 203) and acceptance of a gratuity for assistance in a matter in which the government has a substantial interest (18 U.S.C. § 205).

Based on its review of state, local and federal criminal penalties for violations of government ethics laws, BEGA believes that at least some of the violations of ethics statutes under BEGA's jurisdiction should be subject to criminal penalties because they involve conduct that substantially threatens the public trust.

· BEGA's Current Sanction Authority and Referral Requirements and Recommended Change

Under the current language of Section 215 of the Ethics Act, the Board has the option to: levy its own penalty under Section 221 of the Ethics Act (Section 215 (a) (1)); refer the matter to the U.S. Attorney for the District of Columbia or the D.C. Attorney General for "enforcement or prosecution"; or dismiss the action altogether. Before any of those options may be taken, BEGA

¹¹ Any person who knowingly or willfully violates any of the City's conflict of interest and governmental ethics laws shall be guilty of a misdemeanor and upon conviction thereof shall be punishable by a fine of not more than \$10,000 for each violation or by imprisonment in the county jail for a period of not more than one year in jail or by both such fine and imprisonment. (§ 3.242(a)).

must hold an open, adversarial proceeding involving presentation of evidence by the Director. *See* Section 215 (b). As the statute is currently worded, it appears that the Board may not both impose its own penalty after an open evidentiary hearing and then refer the matter for enforcement or prosecution. This circumstance leaves open the possibility that after holding a full evidentiary hearing, the Board might forgo imposing its own penalty because it is convinced that referral for prosecution or enforcement is appropriate. Because both the U.S. Attorney and the D.C. Attorney General retain the discretion to decline to prosecute despite the Board's referral, it is possible that conduct the Board considers serious enough to refer will nevertheless go unpunished. Moreover, even if the prosecutor moves forward with a prosecution, that effort may fail given the higher standard of proof that would apply in a criminal prosecution. In both instances, the wrongdoer would receive no sanction at all, not even the civil penalties that BEGA could have imposed in the absence of the referral.

Therefore, BEGA recommends that Section 215 of the Ethics Act be changed so that the Board, after presentation of evidence in an open and adversarial hearing, may have the option to both levy a penalty in accordance with Section 221 and refer the matter to the OAG or the U.S. Attorney for enforcement or prosecution.

· Sections of the Code of Conduct That Should be Criminalized

Preliminarily, the Board notes that it does not intend to refer every matter it considers for enforcement or prosecution. It intends to refer only those matters it determines warrant such a referral. Those determinations will be made in light of a variety of factors, including but not limited to: the length of time the respondent engaged in the misconduct; whether the respondent engaged in the misconduct with others; the respondent's specific role in the conduct as compared to other involved persons; the nature, amount, and significance of the harm, if any, to others; the respondent's attempts to remediate the matter; and the respondent's acceptance of responsibility and/or remorse shown.

The District's ability to locally prosecute some crimes is also limited. The District has authority to prosecute where the maximum punishment is a fine only, or imprisonment not exceeding one year unless the law in question provides otherwise. *See* D.C. Official Code § 23-101(a). As a result, BEGA believes the Council would only have authority to expand the OAG's authority to prosecute within the limits of existing authority.

a. Conflict of Interest

As discussed above, many state and local jurisdictions and the federal government have criminal penalties for violation of their conflict of interest laws. BEGA recommends that the violations contained in Ethics Act Section 223, *Conflicts of Interest*, be criminalized.¹² The

¹² Section 223 of the Ethics Act provides, in pertinent part, that:

(a) No employee shall use his or her official position or title, or personally and substantially participate, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter, or attempt to influence the outcome

provisions within Section 223 of the Ethics Act regarding conflict of interest concern unethical conduct that affects the financial interests of the employee and/or those closely affiliated with the employee. Government employees who engage in the prohibited conduct essentially make themselves available to the highest bidder and abdicate their responsibility to act for the public good. Accordingly, violations of Section 223 substantially threaten the public trust and BEGA recommends that they be subject to criminal penalty.

b. Contingency Fees in Procurement

BEGA also recommends that the Council criminalize violations of the D.C. Official Code § 2-354.16, *Contingent fee*, which prohibits payment or solicitation of a fee or other consideration in exchange for the award of a contract.¹³ This section essentially prohibits so-called pay-to-play schemes, which go to the heart of ethical issues in contracting and procurement. Because of the inherent unfairness of such contracting schemes, the potential impact on government services for District residents and the public as a whole, and the potentially negative financial impact on the District from awarding non-meritorious contracts BEGA believes that conduct in violation of D.C. Official Code § 2-354.16 constitutes a substantial threat to the public trust and recommends that the Council subject such violations to criminal penalty.¹⁴

of a particular matter, in a manner that the employee knows is likely to have a direct and predictable effect on the employee's financial interests or the financial interests of a person closely affiliated with the employee.

(d)(1) An employee shall not receive any compensation, salary, or contribution to salary, gratuity, or any other thing of value from a source other than the District government for the employee's performance of official duties.

(2) No employee or member of the employee's household may knowingly acquire:

(A) Stocks, bonds, commodities, real estate, or other property, whether held individually or jointly, the acquisition of which could unduly influence or give the appearance of unduly influencing the employee in the conduct of his or her official duties and responsibilities; or

(B) An interest in a business or commercial enterprise that is related directly to the employee's official duties, or which might otherwise be involved in an official action taken or recommended by the employee, or which is related to matters over which the employee could wield any influence, official or otherwise.

¹³ D.C. Official Code § 2-354.16 provides in relevant part that:

(a) A contractor shall not offer to pay any fee or other consideration that is contingent on the making of a contract.

* * *

(c) A District employee shall not solicit or secure, or offer to solicit or secure, a contract for which the employee is paid or is to be paid any fee or other consideration contingent on the making of the contract between the employee and any other person.

¹⁴ Any such penalty would have to be within the enforcement authority of the D.C. Attorney General pursuant to D.C. Official Code § 23-101, as discussed above.

c. Other Offenses that Substantially Threaten the Public Trust But Are Not Yet a Part of the Code of Conduct

BEGA also believes that other conduct currently within its purview should be criminalized, but before making such recommendations, would like to revise the Code of Conduct, such that there is a uniform Code of Conduct that encompasses all of the conduct prohibited as ethics violations. It is BEGA's intention to include in that revised Code of Conduct not only conduct currently enumerated in the DPM and other portions of the Code of Conduct but conduct included in ethics provisions in other jurisdictions that BEGA feels warrant inclusion in the District's Code of Conduct.

For example, in its research and review of state and local government ethics provisions BEGA has identified provisions that penalize the creation of written instruments designed to further or in any way assist in the prohibited goal of unethical conduct. *See, e.g.,* New York State P.L. § 175.30 *Offering a false instrument for filing in the second degree.*¹⁵ BEGA intends to include rules prohibiting this conduct in its revised Code of Conduct. BEGA also intends to include in the revised Code of Conduct prohibitions against submitting a false written instrument in connection with the defense to or dealings with BEGA in connection with an investigation, negotiation or enforcement of matters under BEGA's jurisdiction including but not limited to any adversarial hearing. Once these provisions are included in the revised Code of Conduct, BEGA will recommend that the conduct be criminalized as it has been in, for example, the New York State provision cited above.

In addition, there is a federal criminal statute that penalizes knowingly and willfully making materially false, fictitious, or fraudulent statements or representations, concealing or covering up a material fact, or knowingly using any materially false, fictitious, or fraudulent statement or entry.¹⁶ BEGA intends to include in the revised Code of Conduct prohibitions against knowingly and willfully (1) falsifying, concealing, or covering up by any trick, scheme, or device a material fact; or (2) making any materially false, fictitious, or fraudulent statement or representation by any person in their dealings with BEGA in connection with an investigation, negotiated disposition, enforcement proceeding, and/or advice giving, regardless of the person's relationship to the matter at issue. Once these provisions are included in the revised Code of Conduct, BEGA will recommend that the conduct be criminalized.

6. Should BEGA be Able to Expel a Member of the Council for Certain Violations of the Code of Conduct?

RECOMMENDATION – In light of recent changes to the District's Home Rule Charter, BEGA recommends that the Council amend the Ethics Act to include a new subsection (c) to Section 222 providing that "The Ethics Board, upon a finding of a

¹⁵ N.Y.S. P.L. § 175.30 Offering a false instrument for filing in the second degree is as follows: "A person is guilty of offering a false instrument for filing in the second degree when, knowing that a written instrument contains a false statement or false information, he offers or presents it to a public office or public servant with the knowledge or belief that it will be filed with, registered or recorded in or otherwise become a part of the records of such public office or public servant. Offering a false instrument for filing in the second degree is a class A misdemeanor."

¹⁶ This language comes from 18 U.S.C. § 1001.

severe threat to the public trust, may further recommend in its censure that the Council act to expel the Councilmember from the Council in accordance with District law and Council rules"; and a new subsection (d) to read, "Recommendations made by the Ethics Board under Subsections (b) and (c) of this Section shall be afforded great weight by the Council in the course of its deliberations."

The Ethics Act currently gives BEGA authority to penalize Councilmembers pursuant to Section 222 of the Act. The penalties authorized are censure and the ability to recommend that the Council suspend or remove a Councilmember's committee chairmanship, committee membership or committee vote. Since passage of the Ethics Act, the District's Home Rule Charter (87 Stat. 777; D.C. Official Code § 1-201 et seq.) has been amended to allow the Council to vote to expel a Councilmember upon a finding by the Council that the Councilmember has committed a violation of "the most serious nature," or after a Councilmember has been convicted of a felony while in office.

Although BEGA recognizes the importance of being able to investigate alleged ethical violations by the District's elected officials and publicly censure them for proven violations, it should be left to the Council itself to expel a sitting Councilmember. The Board therefore, in light of the recent changes to the District's Home Rule Charter, recommends that Section 222 of the Ethics Act be amended to add a subsection (c) stating that the Board may include in any censure a referral to the Council for consideration of expulsion of a Councilmember upon a finding of a severe threat to the public trust. In addition, BEGA recommends that Section 222 of the Ethics Act be further amended to add a subsection (d) providing that any such referral by the Board be afforded great weight by the Council in its deliberations.

7. Should the District Regulate Campaign Contributions from Affiliated or Subsidiary Corporations?

RECOMMENDATION – BEGA recommends that the Council consider the campaign finance bills pending before it remaining mindful of the ethical principles that: campaign contributions should never be used for personal gain; political donors may never exert more influence than others; and openness and transparency in campaign finance is required. BEGA will continue to monitor, evaluate, and research the state of the District's campaign finance regulations from a government ethics perspective and, upon the conclusion of pending potential Council action, will include specific proposed changes in future years' reports if needed.

There are currently several bills pending before the Council regarding campaign finance reform in the District. BEGA recognizes that campaign finance laws and regulations are subject to the interpretation and enforcement of the District's Board of Elections. However, BEGA is obliged to take note of the close connection between government ethics and campaign finance regulation. Toward the end of fulfilling its responsibilities in those areas, BEGA proposes that the following principles form the parameters of the public and the Council's deliberations on campaign finance reform:

- Campaign finance must not be allowed to be used as a tool to convey personal gain – either to a candidate for District office or by an office-holder.
- While always being mindful of political donors' First Amendment protections, the Council should ensure that certain donors are not permitted to exert significantly more influence through the political donation process than other donors, thus potentially impacting (or providing the appearance of potentially impacting) a candidate's or elected official's future decision-making process as it may relate to that donor's interests. Recusal should be considered as a possible tool to ensure elected officials do not act in the future when actual or potentially perceived conflicts may present themselves.
- Full and complete openness and transparency should be required – including enhanced reporting and public disclosure; allowing convenient and up-to-date public access to data and information; and disallowing contributions in the form of cash equivalents, such as money orders, to be substituted for donation instruments that identify and can be traced back to donors.

Consistent with these principles, the Director of Government Ethics, Darin Sobin, has testified concerning the several bills pending before the Council and will continue to provide input and advice as requested by the responsible Council Committee - - the Committee on Government Operations.

8. Are There Additional Recommendations?

This section sets forth additional recommendations based on public comment and BEGA's research and experience to date.

BEGA notes that commentators at its public symposium suggested that, in addition to the seven previous statutorily required questions, BEGA contemplate more fundamental structural and compositional changes to its makeup, authority, and functioning. BEGA will reserve any such comment and potential recommendations for future reports. Other helpful ideas put forward by the public do not require changes to the Code, the Ethics Act, or to BEGA's authority. BEGA will be mindful of other public comments, such as the suggestion that it undertake an assessment of District government ethics risks among other comments, and will make any appropriate public recommendations which come from its reviews in future reports.¹⁷

¹⁷ Other suggestions made at—and through written testimony provided in advance of—BEGA's public symposium not otherwise discussed in this report include:

- BEGA further advancing its advisory role by issuing public guidance on ethics issues and scenarios it finds to be both predictable and fairly straightforward. BEGA agrees and will endeavor to provide such public guidance if granted the power, as requested, to do so.
- BEGA act to increase clarity in the Code. BEGA agrees and, through the recommendations contained in the this report, is seeking to do so.
- BEGA further address concerns about potential future conflicts of interest through promoting additional public disclosures, reforming the contracting and procurement system, and strengthening the District's whistle-blower protections. BEGA agrees and through the recommendations contained in this report has begun to tackle these important issues. BEGA will be considering additional recommendations concerning these issues in future reports.

The following recommendations, if implemented by the Council immediately, would allow BEGA to more efficiently and effectively carry out its mission.

ADDITIONAL RECOMMENDATIONS

a. Explicit Universal Code Applicability and Code Compilation

As noted earlier in this report, it is not always clear to whom certain portions of the Code of Conduct actually apply. This results in both a lack of clarity for District employees and officials as well as the theoretical possibility that portions of the Code could be amended or repealed by subordinate agencies without the prior review and approval of either BEGA or the Council. For example, a substantial number of employees are subject to the Code of Conduct pursuant to Title 6B of Chapter 18 of the District of Columbia Municipal Regulations, a provision that is under the authority of the District's Department of Human Resources such that it could be amended by DCHR without the review or consent of either BEGA or the Council.

The Code of Conduct applies to all subordinate and independent District agency employees, all Council staff, all District Advisory Neighborhood Commissioners, members of District Boards and Commissions, and all elected officials. To make that clear and to allow for all Code provisions to be included in one place, BEGA recommends that it be given the opportunity to draft a Universal Code of Conduct explicitly applicable to all of the aforementioned categories of employees and officials. BEGA proposes that it complete a draft of a Universal Code of Conduct no later than December 31, 2013. BEGA proposes that it submit a draft Universal Code of Conduct to both the Mayor and the Council for review and approval. BEGA proposes that the final Universal Code of Conduct be adopted by both the Executive and the Council.

Alternatively, BEGA notes that the Council could accomplish the goal of a Universal Code of Conduct by amending the Ethics Act to include an explicit universal coverage provision for the Code of Conduct and by authorizing BEGA to promulgate the Code as a single Rulemaking. The Council would retain its authority to review and approve the Rulemaking before it becomes final.

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- Strengthening BEGA's budget independence. Given that this is the first year of BEGA's existence, BEGA is taking this suggestion (like the other structural suggestions made and noted in this report) under advisement. BEGA will consider possible recommendations addressing those issue in future reports.
 - That BEGA engage in outreach to national and local government ethics organization. BEGA agrees and will, both on an ongoing basis and as part of its annual review of best practices continue to reach out to outside organizations and experts for assistance and advice where appropriate.
 - That BEGA understand the difference between "political ethics" and "operational ethics" and focus on both when appropriate to do so. BEGA agrees and will continue to do so under its current authority and will consider recommendations in future reports if any additional authority is found to be needed.
 - That BEGA focus its attention proactively on the areas of government operations which pose the greatest ethical risks, including such areas as licensing and inspections. BEGA agrees and will consider recommendations in future reports if any additional authority is found to be needed.
 - BEGA pressing for greater transparency in District government operations. BEGA agrees and through the recommendations contained in this report has begun to address this issues. BEGA will also be considering additional recommendations concerning this in future reports.

In addition, BEGA's review of the various statutes that comprise the D.C. Official Code of Conduct revealed that there is a lack of rules specifically applicable to ANC Commissioners. ANC Commissioners are not covered by the DPM's definition of an "employee."¹⁸ The D.C. Council has its own Code of Conduct, but it covers only Councilmembers and Council staff, not ANC Commissioners. The conflicts of interest provisions that previously applied to elected officials excepted ANC Commissioners. This gap in coverage of ANC Commissioners must be eliminated so that rules that apply to compensated public officials also apply to uncompensated public officials, such as the ANC Commissioners. Even though the ANC Commissioners themselves are unpaid, their offices are funded with District government funds, their office equipment is paid for with District government funds and they are representatives of the District government. As such, they need to be held accountable for their actions and held to the same rules regarding their use of District government funds as compensated public officials. Therefore, BEGA recommends that when the DPM be revised and the Universal Code of Conduct is created, both are made applicable to ANC Commissioners.

b. Lengthen the 14-Day Deadline for presentation of evidence concerning a complaint to the Board

Under Section 213(e) of the Ethics Act, the Director has a maximum of only 14 days to "cause evidence concerning [a] complaint [of a formal Code violation] to be presented to the Ethics Board." Given that the Board meets regularly only once per month, and considering the complexity such a presentation entails and the care and sensitivity with which the Director must act, 14 days is proving to be an insufficient period of time. BEGA believes that a more reasonable maximum timeframe here is 30 days, with the understanding that the 30 days refers to 30 business days, and that the 30-day period may be extended, for good cause shown to BEGA Board, for an additional 15 business days. BEGA recommends that the Council amend the Ethics Act accordingly.

c. Civil Contempt Finding in Superior Court

Under Section 221(a)(5)(A) of the Ethics Act, BEGA currently has the authority to seek a court order in D.C. Superior Court enforcing a civil penalty if such a penalty issued by BEGA is not paid by the subject of an adverse BEGA finding. BEGA recommends that its power before the court be clarified in the Ethics Act to state explicitly that the court's order would be based on a finding of civil contempt for willful failure to comply with BEGA's decision and imposition of civil penalty. This clarification of the civil penalty provision would ensure the strength of the compliance mechanism and send a significant message that the District is serious about enforcing government ethics violations.

¹⁸ The DPM defines an employee as "an individual employed by the District of Columbia government and subject to DC Code title 1, chapter 6 (1981)." Title 1, Chapter 6 is the Merit Personnel Act, defines an employee as : "an individual who performs a function of the District government and who receives compensation for the performance of such services." (D.C. Official Code § 1-603.01(7)). Because ANC Commissioners do not receive compensation, they are not employees as defined by the Merit Personnel Act and, therefore, are not covered by the DPM, which incorporates the Merit Personnel Act by reference.

d. Access to records and facilities

In order to ensure that it is able to fulfill its statutory obligation to investigate alleged violations of government ethics laws, BEGA recommends that the Ethics Act be amended to include provisions authorizing BEGA, the Director, and the OGE staff to have complete and unrestricted access to all District government records and facilities, including those of Executive and Legislative branch agencies, as well as independent agencies, and all District Boards, and Commissions.

e. Requirement to cooperate

BEGA recommends that the Ethics Act be amended to include provisions making clear that all District government employees are required to cooperate with BEGA in any investigation, negotiated disposition, enforcement proceeding, and/or the giving of advice, with penalties for failure to cooperate. BEGA recommends that a similar requirement be imposed on contractors/vendors as a condition of their contracting agreements with the District.

The following recommended provisions are modeled after those applicable to the New York City Department of Investigation, which, among other things, is the investigative arm of the New York City Conflicts of Interest Board.¹⁹ The provisions also currently are applicable to the District's Office of the Inspector General (the "OIG"). BEGA recommends that the D.C. Official Code § 1-1162.11 and Section 211 of the Ethics Act be amended as follows:

- BEGA (including the Board, the Director, and the OGE staff) shall have the authority to examine, copy or remove any document or record, prepared, maintained or held by any agency, in any form, except those documents or records which may not be so disclosed according to law. Regarding any documents or records which may not be so disclosed according to law, reasonable efforts will be made to redact such documents or records in such a way as to maintain their usefulness while ensuring that disclosure is no longer prohibited by law.

- BEGA shall have the authority to require any District employee or official to answer questions and/or cooperate concerning any matter within the jurisdiction of BEGA pursuant to the Ethics Act. Where appropriate, District employees or officials required to answer questions will first be advised that neither their statements nor any information or evidence derived therefrom will be used against them in a subsequent criminal prosecution other than for perjury, contempt, offering a false written statement for filing (as described above), and/or knowingly and willfully falsifying, concealing, or covering up by any trick, scheme, or device a material fact; and/or making any materially false, fictitious, or fraudulent statement or representation (as described above).

¹⁹ See New York City Mayoral Executive Order No. 16 (July 26, 1978), Section 4. Investigations.

- The refusal of any District employee or official to answer questions and/or cooperate, as described above, shall constitute cause for removal from office or employment or other appropriate penalty. Every District employee or official shall cooperate fully with BEGA. Interference with or obstruction of an investigation, negotiated disposition, enforcement proceeding, or advice giving shall constitute cause for removal from office or employment or other appropriate penalty.

f. Affirmative duty to report violations of the Code of Conduct

BEGA recommends that the Ethics Act be amended to include an affirmative obligation on the part of every District employee or official to report, directly and without undue delay, any and all information concerning conduct which they know or reasonably should know involves a violation of the District Code of Conduct, as set forth below.²⁰

- Every District employee or official shall have the affirmative obligation to report, directly and without undue delay, to the Director, any and all information concerning conduct which they know or reasonably should know to involve a violation of the Code by (a) another District employee or official, which concerns his or her office or employment, and/or (b) persons, companies, entities, and/or organizations dealing with the District, which concerns their dealings with the District. The knowing failure of any District employee or official to report as required above may serve as cause for removal from office or employment or other appropriate penalty.

- All contracts, leases, licenses, and/or other agreements, including grants and/or other forms of payment entered into, paid, issued, authorized, distributed, and/or administered by the District shall contain a provision approved as to form by OAG permitting the District to terminate such contracts, leases, licenses, and/or other agreements, including grants and/or other forms of payment, or to take other appropriate action upon the refusal of a person dealing with the District to answer questions and/or cooperate in relation to such contracts, leases, licenses, and/or other agreements, including grants and/or other forms of payment, as described above.

- Every person, company, entity, and/or organization that holds a District contract, lease, license, and/or other agreement, and/or receives monies from the District, including those who receive grants and/or other forms of payments paid, issued, authorized, distributed, and/or administered by the District shall have the affirmative obligation to report, directly and without undue delay, to BEGA or the Director of Government Ethics, any and all information concerning conduct which they know or reasonably should know to involve a violation of the District Code of Conduct by (a) a District employee or official, which concerns his or her office or employment, and/or (b) persons, companies, entities, and/or organizations dealing with the District, which concerns their dealings with the District. The knowing failure of any person, company, entity, and/or organization that holds a District contract, lease, license, and/or other agreement, including those who receive

²⁰ These sections are modeled after those applicable to the New York City Department of Investigation, as set forth in New York City Mayoral Executive Order No. 16 (July 26, 1978), Section 4. Investigations.

monies from the District through grants or other forms of payment, to report as required above shall constitute cause for termination of the District contract, lease, license, and/or other agreement, including grants and/or other forms of payment, or other appropriate penalty.

g. Safe Harbor

The Ethics Act grants the Director the power to provide a "safe harbor" from future BEGA enforcement action for an individual who relies in good faith on an advisory opinion provided by the Director. Although other District officials, such as District Agency Ethics Counselors and the District's Ethics Counselor in the Office of the Attorney General, currently are empowered to provide government ethics advice to District employees, only the Director is given this safe harbor power under the Ethics Act. BEGA recognizes the importance of the ability of District employees to receive ethics advice from those ethics counselors. However, to help ensure the consistency of that advice to the fullest extent possible, BEGA recommends that the Council amend the Ethics Act to include a provision making it explicit that no District provider of ethics advice other than the Director is empowered to allow any enforceable waiver or exemption to any District employee for any potential violation of the Code of Conduct.

h. Disclosure Requirements for Those Who Earn Outside Income (including Honoraria)

D.C. Official Code §§ 1-1162.24(a)(1)(A)(ii) and 1-1162.25(a) provide that public officials, designated District officials and Advisory Neighborhood Commissioners must file annual financial disclosure reports. The laws require that filers include in the disclosures information including the name of each business entity from which the public official or his or her spouse, domestic partner, or dependent children "[r]eceive honoraria and income earned for services rendered in excess of \$200 during a calendar year" regardless of whether or not that business entity does any business with the District of Columbia government. *See* D.C. Official Code § 1-1162.24(a)(1)(A)(ii).

BEGA believes it is in the District's interests to revise this requirement to require that only clients that do business with the District government be identified. Individuals covered by the financial disclosure requirements would be required to disclose the identities of their (and their spouse, domestic partner, and dependent children's) clients and the activities of those clients which they know or reasonably should know may come before the District government. This change would allow for disclosure of actual or potential conflicts of interest so they may be addressed where appropriate. The revision would also avoid making the disclosure requirement overly burdensome or unnecessary where it would have required identification of clients with no connection to the District government.

In addition, in the past the Office of Campaign Finance ("OCF") issued OCF Form 24 (*Honoraria and Outside Income Disclosure Statement*), requiring annual public disclosure of honoraria and outside income by the Mayor, each member of the Council and each member of

the Board of Education. Form 24 included information for disclosure that is not currently required by the Ethics Act. For example, Form 24 required the filer to identify the agency with which the filer's clients transacted business; the title of any legislation from which the filer's clients stood to gain a direct financial benefit; and information regarding honoraria donated to charities in the filer's name. The Ethics Act does not require disclosure of any of that information, including the information related to honoraria paid to a charitable organization on behalf of the public official. In order to address these omissions, BEGA recommends that the Ethics Act financial disclosure requirements be amended to require public officials to disclose:

- The name of the District agency with which the financial disclosure filer's clients do business;
- The title of any pending legislation from which the filer's clients stand to gain a direct financial benefit;
- Honoraria paid to a charitable organization on behalf of or in the name of the filer or anyone associated with the filer (the filer's spouse, domestic partner or dependent children); and
- The identity of persons and entities that donate and/or grant money to a charitable organization with which the filer (and/or the filer's spouse, domestic partner or dependent children) is associated.

i. Gifts

Several of those who spoke at the BEGA public symposium mentioned the need to revise the ethics rules regarding gifts, calling for more practical consideration to be put into clear rules. BEGA has begun to look at ethics rules regarding gifts in other jurisdictions as possible models for change and will continue to do so. BEGA's review to date has identified New York City's gift rule as a potentially useful model because it sets out the essential parameters of the City's gift rule in one provision with relevant definitions and guidance provided in related provisions. *See, e.g., NYC Charter, Chapter 68, § 2604(b) (5).* New York City's gift rule also imposes on public servants a duty to make reasonable inquiry regarding whether the gift giver is or intends to become engaged in business dealings with the City government.

BEGA is making no recommendations in this area at this time pending completion of its research and review of state, local and federal gift rules.

j. Prohibition on use of public office or employment for private gain

District government employees or officials may engage in unethical conduct that does not necessarily involve a specific identifiable dollars and cents financial gain to themselves or those associated with them. BEGA therefore recommends that the following two provisions be added to the Code of Conduct in order to clarify the currently prohibited concept of "private gain" which is included in the DPM:

· No District employee or official shall use or attempt to use his or her position as a District employee or official to obtain any private or personal advantage, direct or indirect, regardless of whether it involves financial gain for the District employee or official or any person or firm associated with the District employee or official.²¹

· No District employee or official shall engage in any business, transaction, private employment, or other conduct, direct or indirect, regardless of whether it involves financial gain, which is in conflict with the proper discharge of his or her official duties.²²

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²¹ This language is modeled after NYC Charter, Chapter 68, § 2604(b)(3).

²² This language is modeled after NYC Charter, Chapter 68, § 2604(b)(2).

SOURCES

1. Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011, effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-1161.01 *et seq.*) (2012 Supp.)
2. Federal Office of Government Ethics (www.oge.gov)
3. National Conference of State Legislatures, Center for Ethics in Government (<http://www.ncsl.org/legislatures-elections.aspx?tabs=1116,84,205>)
4. City Ethics, Inc. (www.cityethics.org)
5. Los Angeles City Ethics Commission (<http://ethics.lacity.org/govethics>)
6. Cook County (Ill.) Board of Ethics (http://www.co.cook.il.us/portal/server.pt/community/board_of_ethics/293/ethics%2C_board_of/401)
7. New York City Conflicts of Interest Board (<http://www.nyc.gov/html/conflicts/html/home/home.shtml>)
8. City of Philadelphia Board of Ethics (<http://www.phila.gov/ethicsboard/>)
9. Public Testimony of Robert Wechsler, Director of Research, City Ethics, Inc. (<http://www.bega.dc.gov>)
10. Public Testimony of V. David Zvenyach, General Counsel, Council of the District of Columbia (<http://www.bega.dc.gov>)
11. Public Testimony of Kathleen Clark, attorney (<http://www.bega.dc.gov>)
12. Public Testimony of Roderick Woodson, attorney (<http://www.bega.dc.gov>)
13. Public Testimony of Douglas Sloan, Advisory Neighborhood Commissioner (<http://www.bega.dc.gov>)
14. Public Testimony of Marie Drissel, public citizen (<http://www.bega.dc.gov>)
15. Public Testimony of Michael Sindram, public citizen (<http://www.bega.dc.gov>)
16. District Ethics Manual (http://bega.dc.gov/sites/default/files/dc/sites/bega/District_Ethics_Manual.pdf)

17. Robert Wechsler, Local Government Ethics Programs: A Resource for Ethics Commission Members, Ethics Reformers, Local Officials, Attorneys, Journalists, and Students
<http://www.cityethics.org/files/lgep1-0%20-%20Robert%20Wechsler.pdf>

18. Applicable Federal Statutes

5 U.S.C. 3110 (nepotism)
5 U.S.C. 4111 (acceptance of training, travel reimbursement from non-profits)
5 U.S.C. 5531-38 (dual pay - federal & District governments)
5 U.S.C. 7342 (Foreign Gifts)

18 U.S.C. 200 (aiding and abetting)
18 U.S.C. 201 (bribes, illegal gratuities)
18 U.S.C. 202 (definitions)
18 U.S.C. 203 (compensation for representation in claims against the government)
18 U.S.C. 205 (serving as agent/attorney in claims against the government)
18 U.S.C. 207(post employment)
18 U.S.C. 208 (financial conflicts of interest)
18 U.S.C. 209 (post-employment)
18 U.S.C. 216 (civil & criminal penalties)
18 U.S.C. 219 (foreign agents)
18 U.S.C. 601 (deprivation of employment)
18 U.S.C. 602 (solicitation of political contributions)
18 U.S.C. 610 (coerced political activity)
18 U.S.C. 1913 (lobbying)

19. District Statutes and Regulations

D.C. Official Code Provisions

1-319.01 -.05 (Governmental Volunteers)
1-329 (Acceptance of gifts & donations)
1-603.01 (Definitions)
1-608.01 (nepotism in Career Service)
1-1162.01 *et seq.* (Ethics Act)
1-1162.27 (Lobbying)
1-1162.23 (Conflicts of Interest)
1-1162.24 thru 26 (Financial Disclosure)
1-1106.51 (Use of Government Resources for Campaigns)
2-354.01 (Government Contracts- influencing source selection)
2-354.16 (Government Contracts -contingent fees)

D.C. Municipal Regulations

Title 3, Chapter 2- Ethical Conduct of BOEE Members & Employees
Title 3, Chapter 32- OCF Financial Disclosures
Title 3, Chapter 33- Conflicts of Interest
Title 3, Chapter 99- Definitions

Title 6B, Chapter 18 - Employee Conduct
Title 6B, Chapter 35, Part I - Voluntary Services

Orders & Memoranda

Mayor's Order 1982-136a (Ethics Counselor)
Mayor's Order 2010-167 (Oct. 15, 2010) (donations)
Mayor's Memorandum 2003-06 (Outside Employment)
Mayor's Memorandum 2010-2 (Oct. 15, 2010) (donations)
OAG Administrative Memorandum 2006-1 (Fundraising in Office)
OAG Office Order 2006-27 (Outside Employment)