


October 23, 2012

To: Port of Seattle Commission President Gael Tarleton
Commissioner John Creighton, Vice President
Commissioner Tom Albro
Commissioner Bill Bryant
Commissioner Rob Holland

From: LeeAnn Pelham 

Re: Independent Review of the Port of Seattle Ethics Policies

Attached for your consideration is a copy of the report, *An Independent Review of the Port of Seattle Ethics Policies*, which I provide in response to Item 3b of the Port Commission's motion of September 11, 2012.

I look forward to joining you at today's Port Commission meeting to discuss the report and its recommendations.



An Independent Review of the Port of Seattle Ethics Policies

*Pursuant to Port Motion 3b
Adopted by the Port of Seattle Commission
September 11, 2012*

October 23, 2012

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Consulting

ethics | leadership | performance

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EXECUTIVE SUMMARY

On September 11, 2012, the Port of Seattle Commission adopted a motion calling for an independent review of issues related to Port of Seattle Chief Executive Officer Tay Yoshitani's position on the Expeditors International Board of Directors. The Commission appointed Commissioners Tom Albro and Rob Holland to act on its behalf as a Temporary Subcommittee on the matter, and to retain independent reviewers to address the legal and policy questions raised in the Commission's motion.

Part 3b of the September 11 Motion sought an independent review to "provide guidance with respect to the Port's ethics policies on conflicts of interest, with recommendations for any general improvements and/or changes specific to the CEO, Port staff and the Commission."

This report is provided in response to that request. It is not an audit of past or current practices, nor does it address any past action or application of these policies to any individual or circumstance. Rather, it focuses on matters of general policy concerning the Port of Seattle's ethics codes and practices that can support their implementation going forward.

The Port Commission has asked how its existing Port ethics policies and conflict of interest provisions might be strengthened. From a snapshot in time of a program that is continuing to develop, this report offers nine recommendations for consideration by the Port Commission. To further promote an organizational culture of high ethical standards, are the Port's values-based ethics policies as clear as they could be so that standards expressed support actions in practice? Are they comprehensive? Are there sufficient systems and processes in place to support adherence to them? How are consequences for transgressions handled? What steps might help focus and strengthen the effectiveness of the Port's efforts?

As is often the case with controversy for any organization, challenging times often provide great opportunity. This is apparent at the Port of Seattle, which over the past several years has taken new directions, formulated new approaches, and established itself as an organization committed to both high achievement and high integrity. With mechanisms in place for reporting concerns and violations, policies enacted, and steps taken to educate and inform its workforce, the Port has established a strong foundation for a highly effective ethics program.

As the Port continues to pursue these core aims, a clarified set of ethics policies, strengthened disclosure practices, and reinforced organizational structures can contribute to ensuring it can successfully complete the job it has started. The recommendations contained in this report are intended to assist the Port Commission in thinking constructively and creatively as their work in this vital area of public governance continues.

Recommendations in Brief

As discussed more fully in the body of this report, the following recommendations are offered for the Port Commission's consideration:

POLICY

- I.A The Port should consider including in its ethics policies a standard similar to that in the Seattle Municipal Code of Ethics, Sec.16.070 A.6.b, to help guide its ethical analysis into when apparent conflicts of interests are considered to exist, and clarify those circumstances in which reporting an apparent conflict of interest to one's appointing authority is warranted. *See page 15*

- I.B The Port should examine and report on the extent, nature, frequency and sources of any payments received from nongovernmental entities by Port employees and Commissioners in connection with speeches, presentations, appearances, and trade missions made in employees' and Commissioners' official capacities.

The review would enable Port Commissioners to empirically consider whether current policy is sufficiently narrow to prevent actual or perceived conflicts that could arise from nongovernmental payments coincident to Port travel.

Should the Commission determine based on this review that the current policy is appropriate, to strengthen organizational transparency about its activities the Port should establish a regular process of reporting publicly on such nongovernmental payments received by Port employees and Commissioners. *See page 17*

- I.C The Port should add language in its ethics policies to clarify the expectation that it is not permissible for a Port employee or Port Commissioner to negotiate future employment with any person who has a matter currently pending before that official. The restriction for Commissioners would extend to negotiating future employment with persons who have a matter with the full Commission or any of its committees. The provision should also make clear that no employee or Commissioner may take action on any matter involving a person with whom that employee or Commissioner has an agreement for future employment. *See page 18*

PROCESS

- II.A To support transparency the Port Commission should adopt a standard recusal reporting method when any member of the Commission states that he or she will not be acting on any matter due to a conflict of interest or to avoid any appearance of such a conflict. To further promote accountability for decision making in the Port's best interests, a review process should also be established for recusals that continue to occur due to the same continuing interest or frequent recusals regardless of the interest. *See page 20*

- II.B To better align its practices with the intent of the Employee Code of Conduct, the Port should make implementation of a regular and broad-based disclosure mechanism for Port employees a priority. Disclosures should be tailored to the interests that could be affected by the conduct of the employee's official duties. Disclosure should also include reporting of any positions as a director, officer, or management the employee holds in such interests, and any gifts, income or travel payments from those sources or any agent acting on the source's behalf. *See page 21*
- II.C To help equip Commissioners with the information and tools they need to effectively navigate ethics requirements of the law, and manage unique ethics issues in their service to the Port, the Commission should strengthen the ethics component of orientation for new Commissioners. *See page 22*

STRUCTURE

- III.A The Port Commission should establish a reconstituted, semi-independent panel to advise it on provisions of its Code of Ethics, review Commissioner annual financial disclosure statements, and investigate and sanction transgressions by Commission members, when warranted. Methods used for appointing the panel should be revised to maximize the panel's independent perspective for the responsibilities it will be charged with undertaking. The panel should be appropriately staffed to ensure it has the full resources to do the job required of it. *See page 24*
- III.B The Port Commission should establish a Standing Committee on Ethics and Governance. The Committee would have oversight authority over matters relating to promoting the Port's ethics policies, and for regularly monitoring their progress and effectiveness. The committee should review the Port's ethics program and policies at least annually. *See page 26*
- III.C To ensure that the Port has the full benefit of an ethics perspective in shaping and supporting it as an organization of high integrity, the Workplace Responsibility Office should have a 'seat at the table' and have direct reporting authority to the Port CEO. The Workplace Responsibility Officer should also have responsibility to provide specialized support to a Standing Committee on Ethics & Governance Committee of the Port Commission as recommended above in III.B. It should collaborate with the General Counsel and other department heads in that effort. Additional resources to better meet the Port's ethics program aims should be considered. *See page 28*

SCOPE

This review of the Port of Seattle ethics policies was conducted pursuant to a Motion adopted by the Port Commission on September 11, 2012. A copy of the Motion appears in the Appendix. The Motion requested an independent legal analysis of Chief Executive Officer Tay Yoshitani's participation on the Expeditors International Board of Directors, and an independent ethics review of the Port of Seattle's Conflict of Interest provisions generally.

In relevant part, Item 3b in the Port Commission's Motion called for an outside expert to

Review and provide guidance with respect to the Port's ethics policies on conflicts of interest, with recommendations for any general improvements and/or changes specific to the CEO, Port staff and the Commission.

This report provides the results of that review and offers nine recommendations for consideration by the Port Commission.

For purposes of this report, the ethics policies reviewed are the collective ethical standards of conduct for Port of Seattle employees and the Port Commission ("Port ethics policies"), which are articulated in several documents.

The Port of Seattle *Workplace Responsibility Employee Handbook* consists of a Port employee statement of core values, and an umbrella employee Code of Conduct, which is comprised of 14 key Port policies. Seven Code of Conduct policies were reviewed for this report, as they relate directly to the ethical standards that govern real or apparent conflicts between an employee's roles, responsibilities and interests, and how those conflicts are identified, reported, reviewed, investigated or sanctioned. Seven other policies in the Code of Conduct are distinct from this focus and were excluded from review. They are: CC-5, Fraud Awareness and Prevention; CC-6, Loss Prevention; CC-7, Electronic Systems; CC-8, Anti-Harassment; CC-9, Equal Opportunity; and CC-10, Violence in the Workplace; and CC-11, Substance Abuse.

The Employee Code of Conduct policies included in this review were: CC-1, Employee Ethics and Conflicts of Interest; CC-2, Consultant Ethics and Conflicts of Interest; CC-3, Former Employee Ethics and Conflicts of Interest; CC-4, Gifts and Hospitality; CC-12, Employment of Relatives; CC-13 Political Activities; and CC-14, Reporting Concerns or Violations. These are broadly referred to in this report as the "Employee Code of Conduct," unless specified otherwise.

Also included in this review were the Port of Seattle Port Commission Resolution No. 3583 and Exhibit A to that Resolution, which make up the Port of Seattle Code of

Ethics for Port Commissioners (“Commissioner Code of Ethics”). Relevant provisions of the Commission Bylaws, Resolution 361 I (2009), were also reviewed. This report refers to these as “Commissioner Ethics policies” where not specifically identified.

For background on the unique governmental, political, and economic dimensions within which the Port operates, a wide range of documents, reports, articles and memoranda issued by the Port of Seattle and other sources were also consulted within the time permitted. This report, however, is not an audit of past or current practices, nor does it address any past action or application of Port policies to any individual or circumstance.

This report is based on a snapshot in time of an ethics program that is continuing to evolve. The scope of this report focuses on matters of general policy concerning Port ethics policies and their implementation going forward.

CONTEXT

Background on the Port's Ethics Program

The Port of Seattle is a special purpose municipal corporation created under Washington state law, RCW Ch. 53.04.010. It is a unique public agency which, according to Article I of Port Commission Bylaws, has as its “primary mission ... to invest public resources to advance trade and commerce, promote industrial growth, stimulate economic development and create jobs.” It is governed by a five-member Port Commission, whose members are elected at-large by King County voters and serve part-time for a term of four years. Compensated for their services, Commissioners serve, officially, only part-time.

As stated in Article II of its Bylaws, the Port Commission has responsibility to:

- establish policies, direction and long-term objectives of the Port
- hire a Chief Executive Officer to implement Port policies and objectives; administer and operate the Port based on the delegation of administrative responsibility and authority as adopted by Commission resolution. The Commission sets the salary level of the CEO; exercise its discretion in determining the CEO's pay; and reviewing the CEO's performance evaluation and performance pay in public session.
- approve the Port's annual budget and set the amount of an annual tax levy.
- establish the extent to which the Port will exercise powers of taxation and eminent domain.
- establish financial policies, including capital formation and debt issuance.
- determine the types of business activity in which the Port will engage.
- identify short and long-term business strategies that enhance maritime and aviation business, among others.
- approve labor agreements; and
- establish Port positions on government legislation of significance to the Port

For the Port of Seattle, the natural tensions of its identity as a public agency vested with a distinctly business mission appear to have been particularly profound in the period of several years prior to 2007. Under the administration of the prior CEO, who served until his retirement in 2007, public controversies had emerged regarding Port practices, culture

and leadership. They included the issuance of a 334-page Washington State Auditor 2007 Performance Audit report critical of the Port's construction management practices (Report No. 10008, December 2007).

In early 2007 under the leadership of the Port's new CEO, however, significant steps toward greater public transparency and accountability began to be taken at the Port that would have organization-wide reach. They include:

On September 11, 2007, the Port Commission adopted Resolution 3583 and Resolution Exhibit A, reconfirming a Code of Ethics for Commissioners and the principle that "Commissioners are elected officials entrusted with public confidence."

In January 2008, the Port Commission adopted a Transparency Code of Conduct, through which Commissioners reaffirmed each year their commitment to "fostering and maintaining a culture of accountability and transparency within the Commission, among Port employees, and between the Port and King County's citizens."

In early 2008 the Port Commission commissioned its own independent investigative review of Port practices, and in December of 2008, the resulting *Report of the Special Investigative Team* ("McKay report") provided the Port with its recommendations. In part, the report urged the Port to implement a "comprehensive and robust compliance program which sets forth a clear code of conduct and is enforced through training, violation reporting, and whistleblower protection," and "that ensures a viable system for oversight and enforcement." McKay Report, p. 53.

In 2009, Port staff reported the launch a new ethics program for which, in addition to the Port's Ethics and Compliance Hotline, training and communications plans had been identified, multi-year plans were established, and training modules were in development.

In March 2009, the Port Commission adopted revised Bylaws affirming in Article I that Port Commissioners "shall abide by the principle that 'public service is a public trust.' Commissioners shall uphold the integrity, impartiality and independence of the Commission and shall encourage and promote accountability, transparency and public confidence in all their actions."

The Port created a Workplace Responsibility Office, and in January 2010 issued a new statement of values developed by Port employees to help "guide and shape the Port's philosophy and culture." For Port employees, together with a new Employee Code of Conduct, these would form "the foundation for how we do business." It included as its first core value an employee commitment: "We conduct business with the highest ethical standards. Our business practices reflect integrity, accountability, honesty, fairness and respect at all levels." *Workplace Responsibility Employee Handbook*, p. 5.

In February 2010, the Port hired its first Workplace Responsibility Officer, with responsibilities that included employee education and awareness, advising Port employees on ethics-related issues, and ensuring employees read and signed the Employee Code of Conduct by May 2010.

In 2011, the Port undertook an agency-wide employee survey to gauge the climate for reporting potential wrongdoing, and assess the Port's ethical climate and point to areas needing additional focus.

In 2012, the Workplace Responsibility Officer began an internal review of the Employee Code of Conduct to determine what updates might now be beneficial given that the Port is now three years along in implementing its ethics program.



The Port Commission has asked how its existing Port ethics policies and conflict of interest provisions might be strengthened.

Going forward, what changes to Port policies might further promote an organizational culture of high ethical standards and conduct? Are the Port's ethics policies clear and comprehensive? Are there sufficient systems and processes in place to support the achievement of their aspirational standards in practice? How are consequences for transgressions spelled out and handled? What additional steps might focus and strengthen the effectiveness of the Port's efforts?

The following discussion addresses these issues.

DISCUSSION & RECOMMENDATIONS

I. POLICIES

The most effective ethics codes provide clear terms. In codes that express both aspirational or values-based standards and compliance-driven limits, restrictions and prohibitions, this can be a particular challenge. Ideally, values need to be understood in practical terms to set clear expectations. Compliance standards have deeper meaning when they are closely aligned with the principles that underlie them.

This section highlights areas of Port ethics policies that could benefit from further clarification or strengthening.

Port Ethics Policies Regarding Conflicts of Interest and the Appearance of Conflicts

Provisions Relating to the Port Commission

For Port Commissioners, the Commissioner Code of Ethics addresses conflicts of interests in several ways. First, in the Preamble, it states the principles that should motivate Commissioner actions:

“It is assumed and expected that a Commissioner will act in accordance with applicable law and with integrity, and will strive to avoid any appearance of impropriety in the conduct of his/her office.”

Preamble, p. 1.

It also establishes certain basic prohibitions:

Financial Interest Prohibited: No Commissioner may have an interest, financial or otherwise, direct or indirect, or engage in a business or transaction or professional activity, or incur an obligation of any nature that is in conflict with the proper discharge of the Commissioner’s Official duties.

Sec. 4.C, page 6.

Improper Compensation: No Commissioner may, directly or indirectly, ask for or give or receive or agree to receive any Compensation, gift, reward, or gratuity from a source for performing or omitting or deferring the performance of any Official Duty, unless otherwise authorized by law.

Sec. 4.D, page 6.

In addition, in addressing “Financial or Beneficial Interests” and noting certain statutory exceptions, the Commissioner Code of Ethics mirrors requirements of Washington state law and prohibits Commissioners from having interests in certain contracts:

Contracts Prohibited: No Port Commissioner or his/her Immediate Family shall (i) have a Financial or Beneficial Interest, direct or indirect, in any contract which may be made by, through, or under the supervision of the Port Commission, or which may be made for the benefit of the Port, or (ii) accept, directly or indirectly, any Compensation, gratuity or reward in connection with such contract from any other Person beneficially interested therein. Sec. 5.A, p. 7.; RCW Ch. 42.23.030.

Importantly, it also establishes a prohibition on voting in certain circumstances:

Limitation on Voting: A Port Commissioner may not vote in the authorization, approval or ratification of a contract in which he/she or his/her Immediate Family has a Financial or Beneficial Interest even though one of the exemptions under Section 5.B. above allowing such a contract. Sec. 5.C, p. 8.

The Commissioner Code of Ethics also includes a provision regarding “remote interests” in a contract. A remote financial interest may exist when the Port Commissioner:

1. is a nonsalaried officer of a nonprofit corporation
2. is an employee or agent of a contracting party where the Compensation of such employee or agent consists entirely of fixed wages or salary;
3. is a landlord or tenant of an entity contracting with the Port; and
4. is a holder of less than one percent of the shares of, or interest in, a business entity contracting with the Port. Sec 5.D, p. 8.; RCW Ch. 42.23.040.

In these cases, as further provided in Section 5 D, so long as the Commissioner’s interest is only remote; is noted in the Commission’s official minutes prior to formation of the contract; is thereafter approved by a sufficient number of Commissioner’s without counting the vote of the Commissioner with the remote interest; and that Commissioner has not influenced or attempted to influence any other Port Commissioner or employee to enter the contract, that Commissioner is not considered to have an interest in a contract.

Contracts made improperly in violation of the provisions of Section 5 are significant. The contract is void, and any Commissioner voting in violation of the section’s provisions is liable for a penalty of \$500 in addition to any other civil or criminal penalties, as well as grounds for forfeiture of office. RCW Ch. 42.23.050.

The Commissioner Code of Ethics recognizes that certain other activities may give rise to the *appearance* of conflicts for Commissioners in their roles as Port Commissioners.

Special Consideration and Advantages. The Commissioner Code of Ethics requires Port Commissioners to consider and avoid situations in which actions they take could appear intended to secure a special treatment or advantage that suggest impropriety. It states:

A Port Commissioner shall avoid circumstances in which it appears, or to a reasonable person might appear, that the Port Commissioner is requesting or otherwise seeking special consideration, treatment or advantage. Sec. 4.A, p. 5.

A Port Commissioner shall not request or otherwise seek special consideration, treatment or advantage from others, or knowingly engage in activities which are in conflict, or which have the potential to create a conflict, with the performance of official duties. Examples of conflicts, or potential conflicts, of interest include (but are not limited to) circumstances where the Port Commissioner:

1. Influences the selection of, non-selection of, or the conduct of business between the Port and any entity, when the Port Commissioner and his/her Family has a Financial Interest in that entity or any of its competitors.
2. Solicits for himself/herself or for another, a Gift or any other thing of value from the Port or from any Person having dealings with the Port; provided that no conflict of interest shall be deemed to exist with respect to solicitations for campaign contributions required to be reported under Chapter 42.17 RCW or for charitable contributions.
3. Accepts any retainer, Compensation, Gift or other thing of value which is contingent upon a specific action or non-action by the Port Commission.
4. Accepts a Gift in any manner other than as provided in Section 7 below.
5. Intentionally uses or discloses information not available to the general public and acquired by reason of his/her official position which financially benefits the Port Commissioner, his/her Family, friends or others. Sec. 4.B, pp. 5-6.

These examples suggest that some affirmative step, action or initiative to secure special consideration must be taken by the Commissioner to trigger concern about a perceived conflict under Sections 4A and 4B.

Outside Boards. As authorized in Port Commission Bylaws, Commissioners may serve on “Port-related outside boards.” Participation is assigned at the beginning of each calendar year by the Chair in consultation with other Commissioners, with the length of tenure determined at the discretion of the President. As provided in the Bylaws:

Commissioners who serve as members on outside boards shall avoid conflicts of interest. If such conflicts rise, Commissioners shall recuse themselves from any consideration and voting upon the issue that creates the conflict. Art. III, Sec. 7, p4.

Whether actual or apparent conflicts of interests arise for Commissioners in connection with assignment to a Port-related outside board is unclear. The extent to which they do would likely depend on both the nature of the outside board – whether governmental or nongovernmental, for example – and the nature of the Commissioner’s personal financial interests.

Provisions Relating to Port Employees

The Employee Code of Conduct states general values-based standards at its outset. It gives prominence to the principle that employees are charged under the Code with “Serving the Port Loyally,” and establishes there a main principle that is designed to guide employee actions: “The Port’s Interests Come First.” More specifically:

Port of Seattle employees are expected to serve the Port with the highest standards of ethical conduct and to avoid situations that create a real or perceived conflict of interest. CC-I, Sec. I, p.8.

Addressing both actual and perceived conflicts, the Employee Code continues:

A ‘conflict of interest’ exists when an employee’s duty to give undivided loyalty to the Port is influenced, or could be influenced, by personal interest. The fact of a conflict of interest is not in itself a violation of the policy. Instead, it is something that should be reported so the Port may ensure that decisions are not made that could be influenced by the conflict of interest, or perceived to have been influenced by it. CC-I, Sec. I, p. 8.

Port employees must avoid real, or perceived, conflicts of interest between their private activities and their duties and responsibilities as employees.” CC-I, Sec. II, p. 9.

The Code of Conduct then provides several subsections that provide examples of the kinds of circumstances “in which an employee may feel conflicting loyalties between what is in the best interest of the Port and what may be in the best interest of the employee.” These include conflicts from “business relationships,” from “outside employment,” and from “improper compensation.” CC-I, Sec. II, p 9-I I.

Addressing the use of position for personal benefit, the Employee Code of Conduct tracks similar language in the Commissioner Code of Ethics. An affirmative act or step to request or seek a particular treatment or benefit is what gives rise to concern in this provision. It states:

“One particular type of conflict arises when an employee is in a position to exploit his or her role with the Port to advance his or her personal interest. A conflict of interest also arises when an employee may have competing loyalties between his or her personal interests and the Port’s business. Employees must avoid circumstances in which it appears, or to a reasonable person might appear, that the employee is requesting or otherwise seeking special consideration, treatment or advantage because of the employee’s position with the Port.” CC-I, Sec. III p. 11.

That the Employee Code of Conduct underscores the responsibility Port employees to have undivided loyalty in serving the Port’s interests is important. It appropriately focuses

attention on avoiding apparent conflicts that could give rise to perceptions that other interests have a role to play in the Port's business. The challenge in these provisions is providing as much clarity as possible to enable employees to understand the factors that indicate the presence of an apparent conflict.

The Seattle Municipal Code of Ethics contains language that can be instructive, as a point of comparison. In part, that code provides that non-city official and non-employee members of a city Advisory Committee may not engage or have engaged in any transaction or activity that would “to a reasonable person appear to be in conflict” with the official's duties, or

“...which would to a reasonable person *appear to impair the member's independence of judgment or action* in the performance of official duties, without fully disclosing on the public record committee...the circumstances of the transaction or activity giving rise to such an appearance prior to engaging in the performance of such official duties. Such a member shall also file...a full written disclosure of the circumstances giving rise to such an appearance prior to engaging in such official duties.”

SMC 4.16.070 A.6.b., emphasis added.

This provision suggests that apparent conflicts of interests can arise more broadly, beyond situations in which an official takes some affirmative action to seek or request something for herself or another that could appear to be seeking special consideration, treatment, or advantage. When an activity engaged in by a public official is of a nature, which to a reasonable person *would appear to impair the independence of judgment* of an official engaged in such activity, an appearance of conflict can be present.

This criterion could be one that offers some refinement to Port ethics policies regarding when apparent conflicts of interest exist. As a matter of policy, it could be useful to acknowledge the tenet that some activities – by their nature and when they co-exist with the duties required of a public official – can appear to impinge on the independence of judgment that is a fundamental to public decision-making. Building additional factors into policies that address this dynamic, and coupled with disclosure of those activities to an employee's appointing authority, would further the aims of transparency and accountability.

Assessing what constitutes an appearance of conflict can often be more difficult to wrestle with than what constitutes an actual conflict. The Port Employee Code of Conduct, however, firmly establishes that divided loyalties are of concern. Identifying further factors that guide the ethical analysis into these issues would help promote understanding of the intent of the Port's ethics standards, and strengthen how to apply them in practice.

Recommendation I.A

The Port should consider including in its ethics policies a standard similar to that in the Seattle Municipal Code of Ethics, Sec. 16.070 A.6.b, to help guide its ethical analysis into when apparent conflicts of interests are considered to exist, and clarify those circumstances in which reporting an apparent conflict of interest to one's appointing authority is warranted.

Gifts and Travel

Provisions of the Gift policies of the Employee Code of Conduct and the Commissioner Ethics Code are largely parallel. Certain items of value that convey a personal benefit are prohibited or limited under Port ethics policies. Two key provisions establish the fundamental prohibitions and limitations that are intended to guide employee and Commissioner actions alike:

Gift Prohibition

An employee may not receive, accept, take, seek, or solicit, directly or indirectly, any Gift if it could be reasonably expected (or appear to a third party) that the Gift would influence the action or judgment of the employee, or be considered as part of a reward for action or inaction. CC-4, Sec II, A. p. 28.

A Port Commissioner may not receive, accept, take, seek, or solicit, directly or indirectly, any Gift if it could be reasonably expected that the Gift would influence the vote, action or judgment of the Port Commissioner, or be considered as part of a reward for action or inaction. Sec. 7.A, p.10.

Limitations on Gifts

In the Employee Code of Conduct, the Port's general statement of its gift policy for employees is the following:

The Port of Seattle's policy is that gifts and hospitality should never influence imminent decision-making processes or causes others to perceive that there is an influence. Employees may not *solicit* gifts. The Port also discourages employees from *accepting* gifts from an actual or potential business partner. The Port requires employees to follow this policy not only to protect the Port's business reputation but also to protect employees from unfounded allegations of improper behavior. CC-4, Sec. I, p. 27.

Even if the acceptance of the Gift is not solicited and even if accepting the Gift would not influence the employee's action or inaction, the Port believes it is appropriate to limit Gifts to a \$50 value. CC-4, Sec II. C, p. 28.

A Port Commissioner may not accept Gifts, other than those specified in Section 7(E), with an aggregate value in excess of fifty dollars (\$50.00) from a single source in a calendar year or a single Gift from multiple sources with a value in excess of fifty dollars (\$50.00).
Sec. 7C. p. 10

For employees, a “single source” means any person, vendor or “business partner”, whether acting directly or through any agent or other intermediary. For Commissioners, a “single source” means any person, whether acting directly or through any agent or other intermediary. For both, “single Gift,” includes any event, item or group of items used in conjunction with each other or any trip including transportation, lodging, and attendant costs, not otherwise excluded from the definition of Gift. CC-4, Sec II.C., p 28-29; Sec. 7.C. p.10

Both the Employee Code of Conduct and the Commissioner Ethics Code also list a series of common exceptions –unsolicited floral arrangements, nominally-valued promotional items such as pens and notepads, informational material and publications, etc. – that are relatively common business courtesies. These are presumed to not influence an employee’s or Commissioner’s action or non-action, and are therefore acceptable without limit. In the Commissioner Ethics Code, this is a rebuttable presumption that can be “overcome based on the circumstances surrounding the giving and acceptance of the gift.” CC-4, Sec II.D., p 29-30; Sec. 7.E, F. p.12-13.

Both ethics policies also list a series of items that are considered to be excluded from the definition of a gift. These items may be accepted without constituting a violation of the Port’s ethics policies. Included among them is one type of payment that may warrant a second look.

Currently, an employee or Commissioner may receive payments of “reasonable expenses” from, among others, a “nongovernmental entity” when they are incurred in connection with a speech, presentation, appearance, or trade mission made in the Port Commissioner or employee’s official capacity. “Reasonable expenses” are limited to travel, lodging, and subsistence expenses incurred the day before through the day after the event. CC-4, Sec III, p.30; Sec. 7.E, F. p.12,13.

Through a strictly fiscal lens, this policy approach can legitimately be viewed as alleviating a drain on limited operating budgets and public monies. It still affords officials and employees every opportunity to promote vital business, shape industry practices and policies, and ensure visibility of Port opportunities and achievements. From a governance perspective, the challenge is to pursue these critical objectives while also upholding business practices that are, and appear to be, as fair, transparent and accountable as possible to the Port’s broad community of stakeholders.

Do even “reasonable” travel expenses, if regularly accepted and cumulated from any single source over time, give rise to potential conflicts? Depending on the extent, nature and frequency of nongovernmental travel payments, the Port Commission may wish to

consider whether a different policy approach is warranted to better support the Port’s goal of limiting actual or apparent conflicts.

Recommendation I.B

The Port should examine and report on the extent, nature, frequency and sources of any payments received from nongovernmental entities by Port employees and Commissioners in connection with speeches, presentations, appearances, and trade missions made in employees’ and Commissioners’ official capacities.

The review would enable Port Commissioners to empirically consider whether current policy is sufficiently narrow to prevent actual or perceived conflicts that could arise from nongovernmental payments coincident to Port travel.

Should the Commission determine based on this review that the current policy is appropriate, to strengthen organizational transparency about its activities the Port should establish a regular process of reporting publicly on such nongovernmental payments received by Port employees and Commissioners.

Negotiating Future Employment

“Revolving door” provisions of ethics policies are common, and can provide important guidance to officials and employees who move in their employment from public agencies to the private sector, and vice versa. They are designed to support fair and impartial public decision making in circumstances that involve former employees, as well as situations that involve current employees or officials who are seeking future employment with employers whose activities have some nexus to the official’s or employee’s ongoing public responsibilities.

The Port’s Commissioner Ethics Code, Section 8.H, establishes certain standards of conduct for former Port commissioners, including participation in contracts with the Port, appearances before the Port Commission, and participation in any Port contract competitive selection process. The Commissioner Ethics Code is silent, however, regarding the negotiation of future employment while a Port Commissioner with any person who might have a matter pending before that Commissioner or the full Commission.

In the Employee Code of Conduct, expectations for former Port employees are stated to help ensure that, if they transact with the Port after leaving Port service, they “do so in an ethical manner,” and in accordance with the Code’s intent that “Port employees are not influenced in their decision-making and actions by the possibility of obtaining employment or other advantages with third parties after leaving the Port.” CC-3, Sec. 1, p. 24.

The Employee Code of Conduct contains like provisions that address a former employee's interactions with the Port as his or her former employer – such as a prohibition on special consideration, time-based restrictions on appearances before the Commission, contracts with the Port, and participation in any competitive bid selection process. However, it provides no more detailed guidance to employees about circumstances in which they might be seeking employment from someone who has a matter pending before them.

As a point of comparison, Section 4.16.070 of the Seattle Municipal Ethics Code prohibits city officers and employees from influencing or attempting to influence certain City matters in which a person with which that official or employee “is seeking or has an arrangement concerning future employment.”

Absent clear language addressing these types of situations, the Port's ethics policies do not address the potential for ‘divided loyalties’ that can arise when an individual seeking future employment negotiates the possibility of a job with someone whose activities fall within their realm of official responsibilities at the Port.

Recommendation I.C

The Port should add language in its ethics policies to clarify the expectation that it is not permissible for a Port employee or Port Commissioner to negotiate future employment with any person who has a matter currently pending before that official. The restriction for Commissioners would extend to negotiating future employment with persons who have a matter with the full Commission or any of its committees. The provision should also make clear that no employee or Commissioner may take action on any matter involving a person with whom that employee or Commissioner has an agreement for future employment.

II. PROCESS

With any policy implementation, the degree to which a policy is supported operationally with processes and systems can be a significant determinant of the policy's success or failure. With the inception of its ethics program in 2009 and broad steps taken since to educate and inform its workforce, the Port has established a strong foundation for a highly effective program. There are several areas indicating operational gaps, however, that if addressed, would strengthen achievement of core aims of the Port's ethics policies.

Disclosure

“That the people shall be assured that the private financial dealings of their public officials, and of candidates for those offices, present no conflict of interest between the public trust and private interest.”
RCW 42.17A.001(3)

The Port Commission

Holding financial interests that could pose a conflict with one's official duties is a common occurrence that exists for many public officials. This is particularly so for part-time officials who do not leave their 'day jobs' in order to participate in public service. The focus of ethics policies is to preserve fair and impartial decision making that is, and appears to be, untainted by any consideration of personal gain.

Central to this aim is having sufficient tools to ensure transparency about the interests an official holds. Public officials need to be able to 1) regularly identify any personal interests that could be affected by his or her public decision making, 2) know when to seek advice to determine if acting on a matter would be problematic, and 3) not act if advised that doing so would be problematic. Together, these steps help assure that personal interests are not a factor in public decisions.

Section 6 the Commissioner Code of Ethics establishes a process for an annual review of Commissioner Financial Interest statements filed under state law. However, the panel vested with reviewing these statements – the Port Board of Ethics – has not met for several years and is, at present, defunct. This review does not appear to be a current practice. This process should be resumed and is discussed further in the next section of this report and in Recommendation III.A.

Additional types of disclosure can also provide opportunities to vet possible conflicts and establish practices that promote public transparency about the Commission's decision making processes.

Recusal disclosure can occur when a Commissioner has been advised to not act on a matter, either due to the existence of an actual conflict or due to the determination that action would not be in the Port's best interests. Recusing oneself from acting on a matter in an abundance of caution may also occur at the discretion of individual Commissioners even if he or she has not sought or received formal advice to that effect.

For Commissioners, whose actions take place in public meetings, recusals can be stated on the record and include the reason for the recusal. Should a Commissioner have repeated recusals due to the same continuing interest over a particular time frame, those circumstances could trigger an independent review of the circumstances initiating the recusal and the nature of the interests. This process enables transparency about Commissioner participation in decision making and the impact their personal interests may be having on their ability to participate fully in board matters.

Recommendation II.A

To support transparency the Port Commission should adopt a standard recusal reporting method when any member of the Commission states that he or she will not be acting on any matter due to a conflict of interest or to avoid any appearance of such a conflict. To further promote accountability for decision making in the Port's best interests, a review process should also be established for recusals that continue to occur due to the same continuing interest or frequent recusals regardless of the interest.

Port Staff

The 2008 McKay report recommended, among other things, that the Port implement a "robust ethics compliance program" that would include

- "a reporting requirement for all financial interests held by employees in entities doing business with the Port" and
- "a reporting requirement for all potential conflicts of interests, financial or otherwise, of an employee who is in a position to influence the selection, non-selection, or conduct of business between the Port and any entity."

McKay Report, Recommendation VI. A.1.b and 1.c, p.53.

The Port's Employee Code of Conduct establishes a duty to report to the Workplace Responsibility Officer "all potential situations that could present a real or perceived conflict of interest." CC-1, Sec IV, p13. It also states that, "it is the failure to disclose a real or potential conflict of interest, and/or taking action on behalf of the Port

when there is a real or perceived conflict of interest that is of concern to the Port.” CC-I, Sec IV, p. 13.

According to Port staff, a plan for a broad based disclosure program is underway. To date, Port ethics program resources appear to have focused on initiating a process of education to increase ethics awareness among the Port employees. A system exists to inform employees about Workplace Responsibility resources, and to advise employees who self report a possible conflict regarding steps that might be needed to avoid creating an actual conflict.

Regular, tailored disclosure of employees’ interests has the advantage of reminding all employees of their duty to avoid acting on matters that could affect their personal interests. It is a helpful reminder about the need to seek advice and ensure Port decision making is fair and undertaken without regard to employees’ personal financial interests.

Recommendation II.B

To better align its practices with the intent of the Employee Code of Conduct, the Port should make implementation of a regular and broad-based disclosure mechanism for Port employees a priority. Disclosures should be tailored to the interests that could be affected by the conduct of the employee’s official duties. Disclosure should also include reporting of any positions as a director, officer, or management the employee holds in such interests, and any gifts, income or travel payments from those sources or any agent acting on the source’s behalf.

New Commissioner Orientation

It has been customary for Port Commission staff to provide Commissioner briefing materials on the Commissioner Code of Ethics, among other policies, when they assume office. Commission staff also have offered and conducted briefings on those policies. In addition to these more informal sessions, the Commission also has taken the opportunity to schedule more in-depth retreats during the course of the year.

As a large and varied public organization with a culture inevitably influenced by the business environment in which it operates, the Port is an entity whose Commissioners face unusually complex dynamics as elected leaders. To assure that members have a solid footing to lead most effectively through the ethical challenges these circumstances pose, strengthening the ethics component of a new Commissioner orientation process would be beneficial. Such orientation could provide a common basis for, and increased familiarity with, ethical, legal and governance contexts of the Commission’s work.

Recommendation II.C

To help equip Commissioners with the information and tools they need to effectively navigate ethics requirements of the law, and manage unique ethics issues in their service to the Port, the Commission should strengthen the ethics component of orientation for new Commissioners.

III. STRUCTURE

With clear policies established and processes in place to support them, a third area to consider is structural change. What organizational change might reinforce an effective ethics program at the Port and better promote the Commission's capacity to regularly, constructively, and effectively engage on ethics issues? How can Port leadership benefit most regularly from an ethics perspective that is routinely "at the table?"

The Port's Board of Ethics

When a Commissioner needs guidance on a potentially sensitive ethics matter, seeks advice on provisions that apply to him or her, or when transgressions of the Commissioner Ethics Code occur, how are these situations handled, and by whom? How are possible sanctions applied, when warranted, and how are these processes handled with appropriate transparency?

The 2008 McKay report recommended that the Port increase the role of the Port's Board of Ethics as part of a new compliance program. Established by the Port Commission 1992, the McKay report noted, "the Ethics Board is an entity with great promise, [but] it has been historically underutilized and is currently little more than a titular organization." McKay Report, Recommendation VI.A.3, and Footnote 31, p.54.

At present, and for the past several years, the Port's Ethics Board has had no members. Should it be reconstituted?

Section 9.A of the Commissioner Code of Ethics provides that the Port Board of Ethics has authority to:

- (i) interpret the provisions of this Code and other applicable state law;
- (ii) investigate and report to the Port Commission on any alleged violations(s);
- (iii) summon witnesses and schedule hearings in connection with any matter under investigation or inquiry; and
- (iv) impose sanctions, including reprimands and monetary penalties, and
- (v) recommend suspension or removal.

Section 9 H provides that it is the Board of Ethics that reviews all Statement of Financial Affairs filed with it by Port Commissioners annually. At present, no such review is occurring as the Board is not constituted.

On the one hand, vested with these functions, a separate, semi-independent entity within the Port may be best positioned to handle these matters on behalf of the Port Commission.

As an independently elected governing body, the Commission should have a place to obtain outside advice that does not rely on internal staff in the agency it oversees – and particularly so when it involves an alleged transgression by a Commission member. It is both highly awkward and riddled with conflict for a body to investigate itself. If that option is the only one that exists, it should not be surprising that issues in need of inquiry may go un-vetted and unresolved. The avoidance of such issues, however, can result not only in reputational harm individually and organizationally, but, importantly, damage to the public’s trust in the integrity of Port processes and leadership.

Appropriately structured and resourced, a Port Board of Ethics could play a vital role as advisor and accountability partner for the Port Commission by providing necessary mechanisms for resolving its most sensitive issues.

Key considerations in reconstituting a panel should include:

- An appointments process that maximizes independence on the panel. For example, on a five-member panel, a maximum of two members might be appointed by the Port Commission, while the remaining three - a majority of the Board – might be appointed by a panel of former public officials (such as retired judges or retired government attorneys) rather than by the Port Commission.
- Staggered-term appointments, which would help provide both continuity on the panel and insulation from political ‘stacking’.
- Recognition of the organizational requirements necessary to develop and manage an investigative and adjudicative process. Ensuring a fair and neutral hearing officer, clear and well-established procedures, and due process protections are critical. They require fair and thorough procedures, and a unique – and somewhat unpredictable – commitment of time and resources.
- The risks of constituting a panel of part-time volunteers for these purposes absent significant and dedicated staffing should be carefully considered. Any panel constituted for this work should have the opportunity and resources to remain effective and relevant.

Recommendation III.A

The Port Commission should establish a reconstituted, semi-independent panel to advise it on provisions of its Code of Ethics, review Commissioner annual financial disclosure statements, and investigate and sanction transgressions by Commission members, when warranted. Methods used for appointing the panel should be revised to maximize the panel’s independent perspective for the responsibilities it will be charged with undertaking. The panel should be appropriately staffed to ensure it has the full resources to do the job required of it.

Standing Committee on Ethics & Governance

Establishing a Standing Committee for Ethics and Governance could provide the Port Commission with a more active and sustained ownership role of ethics issues at the Port. How ethics policies are institutionalized and monitored speak to the organization's fundamental effectiveness in the broadest sense. It is a key governance issue for any board.

Article III, Section 6 of the Commission Bylaws provide that the Commission "may, from time to time, establish such Standing Committees as are necessary to conduct specialized work." That Section further provides that a Standing Committee may act on behalf of the full Commission as its representative "if they have been approved to do so by the Commission by a vote of the majority in open session and if such authority is expressed in the Committee's Charter." It also provides that the two-member composition of Commissioners is determined by the Port President, with terms generally set at not more than two consecutive years. A third member may be added who is not a member of the Commission. Standing Committees must notice their meetings, hold them in public session, and are staffed by Port Commission staff.

An effective Standing Committee on Ethics at the Commission level would not replace or micro-manage professionals on the Port staff who are responsible for driving the ethics program. It should not create 'busy' work for staff and Commissioners.

An effective Standing Committee on Ethics, however, could:

- be a regular venue for information that supports effective Commission oversight of key Port initiatives and organizational integrity efforts;
- be the 'learning hub' on the Commission's behalf to gain insights into emerging ethics-related issues;
- promote effective direction and feedback to the staff about long-range program objectives;
- provide regular opportunities to explore the impact of ethics policies and issues across Port functions, and consider revisions or changes to Port ethics and governance policies; and
- provide opportunities to regularly engage the public on ethics developments at the Port, thereby strengthening public understanding of the Port's work.

Similar to the Port Commission's Standing Audit Committee, the Port Commission may wish to consider including one public member on the Committee.

Following a recent top-to-bottom organizational review at the New York/New Jersey Port Authority, that agency's board established a standing ethics committee with authority, in part, to "have oversight of questions relating to the development of, and compliance with, governance and ethics principles of the Port Authority." In addition, it has authority to:

- Ensure that the Board of Commissioners and the staff are familiar with and committed to the ethics principles and programs that have been adopted by the Port Authority.
- Reassess the adequacy of the Code of Ethics on an annual basis.
- Review corporate trends and best practices generally with respect to ethics policies and procedures.
- Annually review the ethical standards of the States of New York and New Jersey (and other standards which may be useful in determining best practices for the Port Authority), and make recommendations to be Board of Commissioners concerning appropriate practices.

<http://www.panynj.gov/corporate-information/government-ethics-committee-charter.html#bylaws>

Recommendation III.B

The Port Commission should establish a Standing Committee on Ethics and Governance. The Committee would have oversight authority over matters relating to promoting the Port's ethics policies, and for regularly monitoring their progress and effectiveness. The committee should review the Port's ethics program and policies at least annually.

Workplace Responsibility Office

Since early 2010 the Port's ethics program has been the responsibility of the Workplace Responsibility Officer. That position is housed within the Port's Legal Department.

The Port's 2012 Budget and Business Plan identifies the following major initiatives for the Workplace Responsibility Office:

"Provide overall leadership and coordination of the Port's workplace ethics and compliance activities. Coordinate policy development and implementation. Provide information, guidance, training, and ethics-related legal analysis, advice and counsel.

Receive and manage reported violations and monitor Code of Conduct investigations and outcomes.

It states the following key goals for 2012:

“Support the Port’s attainment of business objectives in a manner that is consistent with our values and the highest standards of business ethics and workplace behavior. Prevention of, preparation of, detection of, and response to violations of the Port’s Code of Conduct and other legal or policy expectations.”

CEO 2012 Budget Message to Port Commission, 12/15/11, p. VIII-3.

Currently, the Workplace Responsibility Office has a staff of one. Even with the most collaborative of processes and colleagues, however, this resource level may have the effect of impeding the Port’s capacity to meaningfully realize its ethics program goals in an organization of its size and complexity. Additional resources should be considered.

In addition, to support achievement of the major initiatives set out for the Port’s workplace and ethics programs, an alternative reporting model for the Workplace Responsibility Office within the Port organization should be considered. The nature, scope and priority of the Port’s ethics work suggest that the position of Workplace Responsibility Officer is one that should report directly to the Chief Executive Officer.

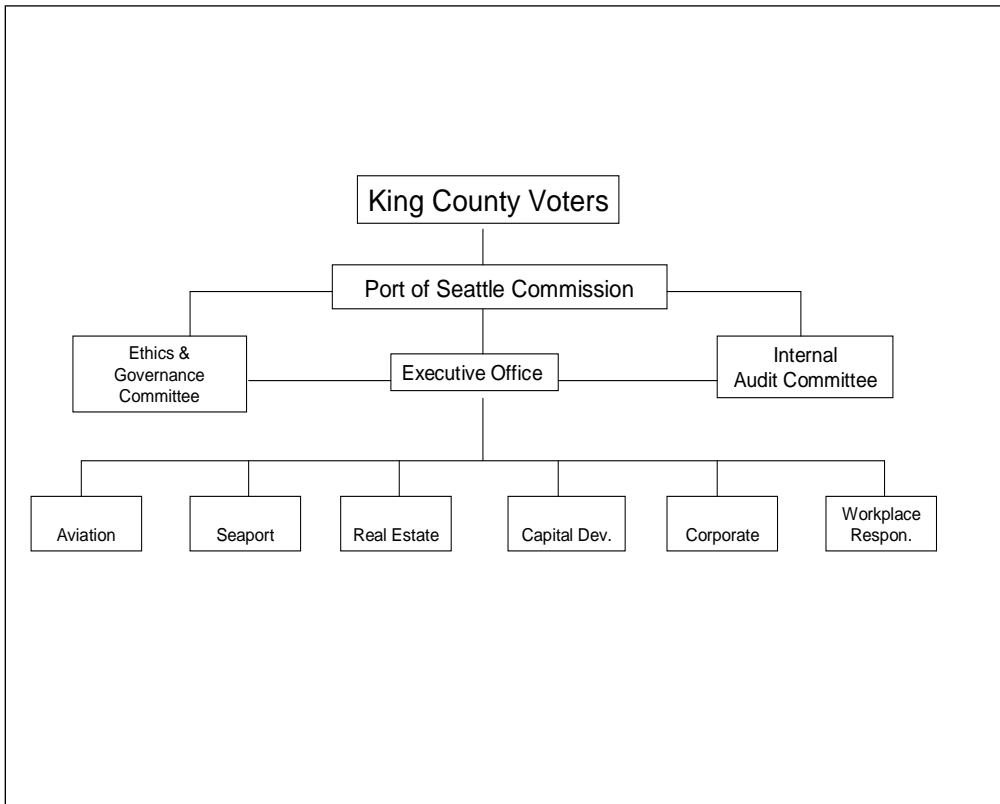
The Port’s Workplace Responsibility Policies “are interrelated and fundamental to how the Port conducts all aspects of its business.” Workplace Responsibility Employee Handbook, p.6. The Port’s values-based ethics policies and program are different from those that are purely compliance driven. Placing them organizationally under the direction of the Legal Department can send conflicting messages about the ethics program’s focus and inhibit its potential in ways that may not be intended.

It is important to underscore the distinct perspective that a values-based ethics program brings to all Port operations. The inevitable grey areas that arise in any organization need both strong legal analysis and an analysis of the circumstances and questions from a broader ethical perspective. Such analysis is a vital contribution to ensuring the fullest range of critical thinking about issues that can have significant reputational, morale, and integrity consequences for an organization.

Recommendation III.C

To ensure that the Port has the full benefit of an ethics perspective in shaping and supporting it as an organization of high integrity, the Workplace Responsibility Office should have a 'seat at the table' and have direct reporting authority to the Port CEO. The Workplace Responsibility Officer should also have responsibility to provide specialized support to a Standing Committee on Ethics & Governance Committee of the Port Commission as recommended above in III.B. It should collaborate with the General Counsel and other department heads in that effort. Additional resources to better meet the Port's ethics program aims should be considered.

Figure 1- Illustration of organizational changes discussed in Recommendations III.B and III.C



PORT OF SEATTLE COMMISSION

**MOTION REGARDING INDEPENDENT REVIEW OF
THE CHIEF EXECUTIVE OFFICER’S POSITION
ON THE EXPEDITORS INTERNATIONAL BOARD OF DIRECTORS
AND PORT OF SEATTLE CONFLICT OF INTEREST PROVISIONS**

September 11, 2012

Statement in Support of Motion

Expeditors International of Washington, Inc. (“*Expeditors*”) announced on August 10, 2012, that Port of Seattle Chief Executive Officer (“*CEO*”) Tay Yoshitani had accepted its invitation to join the Expeditors International Board of Directors. The CEO’s Retention Agreement, adopted by the Commission in public session on March 1, 2011 (the “*Retention Agreement*”), specifically allows the CEO to participate on a private sector board of directors.

The Retention Agreement states: “During the term of this Agreement, CEO may on his own time (e.g., after close of business or while on Paid Time-Off), participate as a member of a Board of Directors for a private entity; *provided*, that prior to accepting such appointment, the Port’s General Counsel determines that CEO’s participation would not create or appear to create a conflict of interest, or is contrary to any other provision of the Port’s Code of Ethics for Employees.”

It is important that the Seattle Port Commission (the “*Commission*”) carefully review this matter and obtain the best outside legal counsel and ethical advice to ensure that it is carrying out its fiduciary responsibilities to the Port under state law and the Commission’s Bylaws, to confirm that all terms of the Retention Agreement were properly complied with, and to properly oversee the implementation of the delegation of authority (to the CEO) as provided by Commission Resolution No. 3605, as amended.

Motion

1. The Commission hereby authorizes the reasonable expenditure of funds and directs a temporary committee of the Commission to be established as provided by Section III, Clause 6, of the Commission’s Bylaws to oversee the hiring of independent counsel and ethics experts as described below.
2. The Commission shall retain outside legal counsel to provide an independent review and analysis of the legal basis for a finding of no actual, potential or apparent conflict of interest with respect to the CEO’s outside board position detailed above, and compliance with all applicable state and federal laws.
3. The Commission shall also retain an expert to:
 - a. Provide a timeline of pertinent events from the time Mr. Yoshitani’s Retention Agreement was approved on March 1, 2011 to September 10, 2012, with respect to

the approval process with respect to the Expeditors board position. Event descriptions will minimally include individuals involved and matters addressed and any other relevant facts.

- b. Review and provide guidance with respect to the Port's ethics policies on conflict of interest, with recommendations for any for general improvements and/or changes specific to the CEO, Port staff and the Commission.
4. The reports called for in Sections 2 and 3 shall be presented to the full Commission in public session no later than October 23, 2012.
5. Commissioners Tom Albro and Rob Holland shall represent the Commission on a temporary committee of the Commission in interviewing and choosing both outside legal counsel and outside experts.

About the Independent Reviewer

LeeAnn Pelham advises on the design and advancement of governmental ethics programs, public sector leadership, and the implementation of political reform. Previously, she served as the Executive Director of the Los Angeles City Ethics Commission from 2001 to 2011, and has held leadership positions nationally on the board of the Council on Governmental Ethics Laws (COGEL). She holds a Master of Public Policy degree from the University of Michigan and a Bachelors degree in Government from Georgetown University. A Northern California native, she is currently based in Southeastern Los Angeles County and the San Francisco East Bay.