

## AGENDA REPORT

**Resolution and Ordinance:** Adoption of a Resolution to Approve the Rescission of Port of Oakland (“Port”) Administrative Policy and Procedures (“AP”) 16 (Internal Review Protocol) and to Amend AP18 (Whistleblower Protection Policy) and AP19 (Whistleblower Hotline Policy) and Enactment of an Ordinance to Amend Article XI (Chief Audit Officer) of the By-Laws and Administrative Rules of the Board of Port Commissioners (“By-Laws”).

**MEETING DATE:** 5/13/2021

**AMOUNT:** \$0

**SUBMITTED BY:** Arnel Atienza, Acting Chief Audit Officer

**APPROVED BY:** Arnel Atienza, Acting Chief Audit Officer

**ACTION TYPE:** Resolution and Ordinance

### **EXECUTIVE SUMMARY:**

Port staff recommends that the Board of Port Commissioners (“Board”) adopt a resolution to rescind AP16 (Internal Review Protocol) and to amend AP18 (Whistleblower Protection Policy) and AP19 (Whistleblower Hotline Policy) and enact an ordinance to amend Article XI (Chief Audit Officer) of the By-Laws.

Port staff initially presented proposed revisions to the above-referenced documents to the Audit Committee during its October 15, 2020 meeting to clarify and codify the Port’s existing audit practices. After receiving input from the Audit Committee in open session, the Office of Audit Services (“OAS”), in coordination with the Port Attorney’s Office, made additional proposed changes to AP18 and AP19 to: (a) address conflict of interest issues that may arise in the conduct of in-house investigations of whistleblower complaints; (b) clarify the proper Port appointing authorities responsible for initiating any appropriate personnel actions resulting from the whistleblower complaint investigation; and, (c) revise the current language to deter vexatious whistleblowers and to hold them accountable for their actions.

The proposed changes were then presented to the Board during its November 5, 2020 meeting for final adoption and approval, but the Board took no action. Instead, the Board instructed staff to go back to the Audit Committee to further discuss and address two issues that were raised during the Board meeting: first, whether the Whistleblower Hotline should be limited to Port employees only; and, second, whether the proposed revisions regarding vexatious complaints could be further strengthened to deter vexatious whistleblowers and hold them accountable for their actions.

Port staff has since completed further analysis and research, made additional revisions to address those two issues, and presented them to the Audit Committee during its April

15, 2021 meeting. Other than the original proposed changes and the two additional changes discussed above, no further proposed revisions have been made by Port staff.

By Motion unanimously passed during its April 15, 2021 meeting, the Audit Committee approved all the proposed changes and recommended that the Board approve and authorize such changes.

The initial proposed changes are redlined against the current versions of these documents and are attached as Exhibits A (AP16), B (AP18), C (AP19), and D (By-Laws) to this Agenda Report. The proposed changes made after the November 5, 2020 Board meeting and in response to issues raised by Board members at the meeting are both redlined and highlighted in yellow.

## **BACKGROUND**

Policies and procedures are living documents that should adapt as business and operational needs change over time. It is therefore a best practice to review these policies and procedures regularly to ensure that they are kept up to date and reflect current industry standards, legal requirements, and organizational needs. To this end, the OAS reviewed the following documents that guide its operations:

- AP16 - Internal Review Protocol;
- AP18 - Whistleblower Protection Policy;
- AP19 - Whistleblower Hotline Policy; and,
- Article XI of the Board's By-Laws.

After review and consultation with the Port Attorney's Office, the OAS initially made several proposed amendments to each of the referenced documents that reflect current industry standards, legal requirements, and organizational needs that will benefit OAS operations.

## **DISCUSSION AND ANALYSIS**

### **AP16 - Internal Review Protocol (Exhibit A)**

AP16 was adopted by the Board under Port Resolution No. 03068 in March 2003. This document sets forth the policies and guidelines for a newly established function at the time of adoption called "internal reviews." This function required the performance of internal reviews of Port divisions and departments to assess overall regulatory compliance, operational efficiency, and performance of personnel, and it provided for the implementation of corrective measures as warranted. Over time, this internal review function has now evolved into a fully functioning "Internal Audit Section" of the OAS.

AP16 has not been revised since its inception in 2003. Because the protocol for an “internal review” in this policy significantly differs from the current “internal audit” process that is conducted independently under the guidance of professional auditing standards, this policy is almost completely outdated. In fact, it has been removed from the Port’s Administrative Policy Catalog for several years as part of the overall Portwide clean-up of APs in the mid-2010s. However, it was resurrected in 2019 because of the absence of an official Board resolution rescinding the policy.

At its April 15, 2021 meeting, and at the request of the OAS, the Audit Committee approved the rescission and recommended that the Board approve and authorize the rescission of AP16 in its entirety.

### **AP18 - Whistleblower Protection Policy (Exhibit B) and AP19 - Whistleblower Hotline Policy (Exhibit C)**

The Board adopted AP18 and AP19 under Port Resolution No. 10-119 in September 2010 concurrent with the launch of the Port’s Whistleblower Hotline Program. In short,

- AP18 affirms the Port’s policy to protect employees, who act as whistleblowers, from retaliation and sets forth guidelines for submitting and investigating whistleblower retaliation complaints, including repercussions for Port officers and employees who are found to have violated this policy; and,
- AP19 establishes the Whistleblower Hotline to provide a confidential and timely process for reporting fraud, waste, abuse, or any violations of work-related laws or regulations. This policy sets forth the guidelines for submitting whistleblower complaints, investigating the complaints, and reporting the results of the investigations.

Although both AP18 and AP19 have been reviewed periodically, no formal update has been conducted since their adoption in 2010. As part of this current update process, the OAS:

- checked for any changes to governing laws and regulations;
- benchmarked the Port’s current practices with other jurisdictions;
- reviewed industry benchmarking from our third-party Whistleblower Hotline in-take provider;
- reviewed other relevant Port administrative policies; and,
- checked for the consistency of policy level-type changes.

Because these procedures did not require any substantive revisions, the proposed stylistic changes, as initially presented to the Audit Committee on October 15, 2020, primarily included clean-up language to clarify and codify existing OAS practices pertaining to Whistleblower Complaints. Those changes are redlined in the attached APs.

However, after receiving input from the Audit Committee in open session during its October 15, 2020, meeting, Port staff also proposed the following substantive changes to AP18 and AP19:

- a) adding language to AP18, Section II(B) that requires the Chief Audit Officer (“CAO”) to refer a written finding that an employee filed a complaint that was “knowingly false or made in reckless disregard of the truth” to the employee’s appointing authority (as defined in the By-Laws) for appropriate disciplinary action;
- b) adding language to AP18, Section III(E) that requires the CAO to forward sustained findings of policy violations to the employee’s appointing authority (as defined in the By-Laws) for appropriate disciplinary action (with a copy to the Port Attorney and Human Resources Director for coordination); and,
- c) adding language to AP19, Section III(B)(2) to address a conflict of interest or the appearance of conflict of interest during the whistleblower complaint investigation process.

Finally, after receiving input from the Board in open session during its November 5, 2020 meeting, and in response to such input, Port staff proposes the following additional substantive changes to AP18 and AP19:

- d) revising the previously proposed definition of “whistleblower” in AP18 Section II(A) to limit the definition of “whistleblower” to “Port officers and employees” only;
- e) revising the previously proposed change to AP19 Section II(C) to limit the use of the Whistleblower Hotline to Port employees only; and,
- f) adding language to AP19, Section III(B)(3) to address vexatious Whistleblower Reports and vexatious Whistleblowers and to provide for sanctions for both.

The initial proposed changes as well as the proposed changes that respond to the concerns raised by the Audit Committee are redlined in the draft versions of AP18 and AP19 and are attached as Exhibits B and C, respectively. The proposed changes that respond to the issues raised by the Board during its November 5, 2020 meeting are both redlined and highlighted in yellow in the referenced exhibits.

The changes are as follows:

<b>Policy:</b>		<b>Proposed changes:</b>
<b>AP18</b>	Section I	Stylistic change to define the Port.
	Section II	<ul style="list-style-type: none"> <li>a) Stylistic change to define whistleblower complaint.</li> <li>b) Change to further clarify that a whistleblower is limited to Port officers or employees.</li> <li>c) Change to define “Port officer or employee” as “employee”</li> <li>d) Changes to address a whistleblower who files a complaint that is knowingly false, made in reckless disregard of the truth, or that lacks any arguable basis to</li> </ul>

Policy:		Proposed changes:
		support its claims and to refer the whistleblower to their appointing authority for disciplinary action.
	Section III	Changes to further clarify that: <ul style="list-style-type: none"> <li>a) Certain provisions apply only to Port officers and employees (“employees”).</li> <li>b) The Office of Equal Opportunity’s role in investigating whistleblower retaliation complaints.</li> <li>c) The Port Attorney’s receipt of a copy of the CAO’s investigation report.</li> <li>d) The appropriate Port appointing authority who will be responsible for initiating any appropriate personnel action resulting from whistleblower complaint investigations.</li> <li>e) The Port Attorney’s receipt of a copy of the quarterly Whistleblower Hotline status report.</li> </ul>
<b>AP19</b>	Section I	Change to specifically include the words “fraud, waste, and abuse” in the reportable items to the Whistleblower Hotline.
	Section II	A few edits to clarify that the Whistleblower Hotline is limited to Port employees only and to make language consistent.
	Section III	<ul style="list-style-type: none"> <li>a) A few edits for consistency and clarity.</li> <li>b) Edits to delete unnecessary procedural steps that do not need to be included at the policy level.</li> <li>c) Language revision to clarify the recipients of a new hotline report, and that the third-party hotline provider will send a notification and not a copy of a new report of the complaint.</li> <li>d) Change to address potential conflict of interest issues that arise during whistleblower complaint investigations.</li> <li>e) Change to include protocols to address frivolous Whistleblower Complaints and vexatious Whistleblowers and to hold vexatious whistleblowers accountable for their actions.</li> </ul>

Regarding frivolous Whistleblower Reports, the new language provides the Hotline Administrator with the authority, at any time, to dismiss a frivolous report. Doing so would require the Hotline Administrator to issue written findings that the Whistleblower Report lacks any arguable basis to support its claims, that it was made in reckless disregard of the truth, or that it was knowingly false. Further, the new language defines a vexatious Whistleblower as a Port employee who, based on the written findings of the Hotline Administrator, has filed more than one Whistleblower Report that was knowingly false,

that was made in reckless disregard of the truth, or that lacked any arguable basis to support its claims. The Hotline Administrator may then make a disciplinary referral of the vexatious Whistleblower and/or summarily dismiss their Whistleblower Reports without investigation.

At its April 15, 2021 meeting, and at the request of the OAS, the Audit Committee approved the changes to AP18 and AP19 and recommended that the Board approve and authorize such changes.

**Article XI of the Board By-Laws and Administrative Rules (Exhibit D)**

The By-Laws have historically been the document by which the Board has codified the rules governing its operations, including the assignment of its duties and the delegation of its powers. Article XI of the By-Laws provides guidance on the authority, duties, and responsibilities of the CAO, a direct reporting officer to the Board.

The best practice guidance from the Institute of Internal Auditors recommends that an Internal Audit function have a charter that primarily sets forth guidelines confirming an auditor’s independence and objectivity; authority; access to records; professionalism; responsibilities; and, the completion of audit reports. Since the CAO’s authority and responsibilities are already addressed in the By-Laws, it is more efficient and simpler to make the following changes to Article XI of the By-Laws instead of creating a new separate audit charter document:

<b>Article XI, By-Laws:</b>	<b>Proposed changes:</b>
Section 1	Adds language to require that the CAO’s work be objectively conducted under the guidance of applicable professional standards.
Section 3	Adds this new Section to incorporate the CAO’s authority to access Port’s records during the conduct of surveys, reviews, and audits; and the corresponding responsibility to safeguard and keep the confidentiality of those records. This is a standard practice in the audit industry and has also been an ongoing but uncodified practice at the Port.
Section 5	Adds the word “independently” to describe and affirm the discretion of the CAO’s professional opinions.

At its April 15, 2021 meeting, and at the request of the OAS, the Audit Committee approved the changes to Article XI of the By-Laws and recommended that the Board approve and authorize such changes.

**BUDGET & STAFFING**

The proposed changes do not have budgetary or staffing impact.

## **MARITIME AVIATION PROJECT LABOR AGREEMENT (“MAPLA”)**

The matters contained in this Agenda Report do not fall within MAPLA and the provisions of MAPLA do not apply.

## **STRATEGIC PLAN**

The actions described herein will help the Port achieve the following goals and objectives in the Port Strategic Plan:

Goal J: Improve Internal Governance Practices

## **LIVING WAGE**

Living wage requirements, in accordance with the Port’s Rules and Regulations for the Implementation and Enforcement of the Port of Oakland Living Wage Requirements (the “Living Wage Regulations”), do not apply because the requested action is not an agreement, contract, lease, or request to provide financial assistance within the meaning of the Living Wage Regulations.

## **SUSTAINABILITY**

Port staff have reviewed the Port’s 2000 Sustainability Policy and did not complete the Sustainability Opportunities Assessment Form. There are no sustainability opportunities related to the proposed actions because it does not involve a development project, purchasing of equipment, or operations that presents sustainability opportunities.

## **ENVIRONMENTAL**

The California Environmental Quality Act (CEQA) Guidelines, Section 15061(b)(3) (“the general rule”) states that CEQA applies only to the projects that have the potential for causing a significant effect on the environment. No such effect is anticipated here.

## **GENERAL PLAN**

This action does not change the use of any existing facility, make alterations to existing facility, or create a new facility; therefore, a General Plan conformity determination pursuant to Section 727 of the City of Oakland Charter is not required.

## **OWNER-CONTROLLED INSURANCE PROGRAM (“OCIP”)**

This action is not subject to the Port’s OCIP as it is not a capital improvement construction program.

## **OPTIONS**

- The Board adopt a resolution to approve the rescission of AP16 (Internal Review Protocol) and to amend AP18 (Whistleblower Protection Policy) and AP19 (Whistleblower Hotline Policy) and enact an ordinance to amend Article XI of the Board's By-Laws as described in this Agenda Report and in its Exhibits. The Audit Committee and Port Staff recommend this action.
- The Board adopt a resolution to approve different changes to AP16 (Internal Review Protocol), AP18 (Whistleblower Protection Policy), and AP19 (Whistleblower Hotline Policy) and enact an ordinance that provides different amendments to Article XI of the Board's By-Laws.
- The Board does not make any changes to AP16, AP18, AP19, and Article XI of the By-Laws and take no action.

## **RECOMMENDATION**

The Audit Committee and Port Staff recommend that the Board adopt a resolution to approve the rescission of AP16 (Internal Review Protocol) and to amend AP18 (Whistleblower Protection Policy) and AP19 (Whistleblower Hotline Policy) and enact an ordinance to amend Article XI of the Board's By-Laws as described in this Agenda Report and in its Exhibits.