

M E M O R A N D U M

November 18, 2020

TO: Government Operations and Fiscal Policy Committee

FROM: Robert H. Drummer, Senior Legislative Attorney

SUBJECT: Bill 42-20, Ethics – Public Accountability and Transparency - Amendments

PURPOSE: Worksession – Committee to make recommendations on Bill

Expected attendees:

Robert Cobb, Executive Director, Ethics Commission

Bill 42-20, Ethics – Public Accountability and Transparency - Amendments, sponsored by Lead Sponsor Councilmember Friedson and Co-Sponsors, Councilmember Rice, Council President Katz, and Councilmembers Glass, Navarro and Council Vice President Hucker, was introduced on September 29, 2020. A public hearing was held on October 20 with one speaker.¹

Bill 42-20 would:

- require the Executive to disclose a proposed employment contract with an appointee to a non-merit position and any employment contract with an employee currently serving in a non-merit position to the Council;
- include the sale or promotion of certain intellectual property by a public employee as other employment;
- prohibit a public employee who has received compensation from an individual or organization in the previous 12 months from participating in a procurement with that individual or organization;
- require a public employee who participates in a procurement process with an individual or organization seeking to do business with the County that compensated the public employee for services performed more than 12 months before the participation began to disclose the prior relationship to the Procurement Director;
- require an elected official or non-merit employee to disclose, with some exceptions, the source of each fee greater than \$1,000 received for services in a financial disclosure statement; and
- prohibit the Chief Administrative Officer from engaging in other employment.

Lead Sponsor Councilmember Friedson explained his reasons for introducing Bill 42-20 in a memorandum at ©13. The Bill would be known as the Public Accountability and County Transparency Act. The County Attorney's Office suggested a clarifying amendment at ©16.

¹#PACTAct

Md. General Provisions Code Ann. § 5-807 requires the County to enact a public ethics law covering conflicts of interest, financial disclosure, and lobbying. Sections 5-808, 5-809, and 5-810 require the County Ethics Law to be similar to the State Public Ethics Law for employees and the equivalent or stricter than the State Public Ethics Law for elected officials. The County has enacted Chapter 19A, Ethics to comply with these State laws. Bill 42-20 would add new provisions to the County Ethics Law that are stricter than the current provision.

Public Hearing

The lone speaker, Dale Tibbitts, speaking for the Executive, supported the Bill without any suggested amendments.

Issues

1. Should the Executive be required to disclose any proposed employment contract for an Executive appointee to a non-merit position and the final employment contract entered with a non-merit employee of the Executive Branch?

The County Personnel Regulation and, if applicable, a collective bargaining agreement describe the terms and conditions of employment for a merit system employee. However, the Personnel Regulation does not cover non-merit employees. Although County Code §1A-104(e) requires the Executive to propose a salary schedule for non-merit employees subject to Council approval, the terms and conditions of employment for non-merit employees is not generally established in law.² Executives have developed their own policies on the treatment of non-merit employees often embodied in an individual employment contract with each non-merit employee. These individual employment contracts with County non-merit employees are subject to disclosure under the Maryland Public Information Act, but they are not generally made public absent a request.

Bill 42-20 would require the Executive to disclose any proposed employment contract for an Executive appointee to a non-merit position and the final employment contract with a non-merit employee. Disclosure of each employment contract to the Council would aid the Council in its confirmation process and provide public disclosure of these agreements on a global scale. This would increase transparency to the public and enhance the Council's ability to exercise its oversight role of the Executive Branch. The Executive supports this provision.

2. Should outside employment include the sale or promotion of intellectual property by a public employee?

County Code §19A-12 prohibits a County employee from engaging in outside employment unless it is approved by the Ethics Commission. Many County employees have outside employment that has been approved by the Commission. The County set up an electronic system to request approval that generally works quickly. Both the County's supervisor and the Commission check to ensure that the outside employment does not create a conflict under the Ethics Law. Bill 42-20 would

² There are some exceptions, such as the provisions of the retirement plans contained in Chapter 33 of the Code.

add the sale or promotion of intellectual property as an example of outside employment that must be approved by the Commission.

The Bill includes examples of intellectual property that would be covered such as books, newspaper, magazine, or journal articles, videos, crafts, and artwork. The sale or promotion for sale of these items produced by the employee are often done by the employee without a formal position of employment. This provision would not require an employee to receive Commission approval to write a book, but it would require the employee to receive permission to advertise the book for sale. Although most examples of this are unlikely to result in a conflict of interest, it can and has happened that the promotion for sale of intellectual property has resulted in a conflict of interest.

The Ethics Commission requested this amendment to the Ethics Law among other requests earlier this year. A copy of the Ethics Commission September 18 memorandum is at ©21-28.

3. Should the Chief Administrative Officer (CAO) be prohibited from outside employment?

The Bill would prohibit the CAO from any outside employment. All other merit and non-merit employees would still be able to engage in outside employment approved by the Ethics Commission. The CAO is responsible for managing the Executive Branch and is the highest paid employee in the County. Code §33-8(a) makes the CAO responsible for the administration and enforcement of the merit system, including any retirement laws, labor relations laws, and the personnel regulations.

The former CAO left his position after a finding that he had violated the County Ethics Law through his outside employment. Bill 42-20 would avoid a repeat of this problem by prohibiting the CAO from engaging in outside employment. It would create a distinction between this position and every other County non-merit and merit position. The rationale is that the person holding the highest County position must set an example of the highest ethics and integrity for all County employees.

4. Should a public employee avoid participation in any matter with a business or individual that the employee was associated with in the prior 12 months?

Bill 42-20 would prohibit a public employee who has received compensation from an individual or organization in the previous 12 months from participating in a procurement with that individual or organization. Code §19A-11 generally prohibits a public employee from participating in a matter that involves a business or individual with which the employee has an economic interest. Bill 42-20 would add a new prohibition for participation in a procurement matter with a business or individual with which the employee had an economic interest in the prior 12 months.

The County Procurement Law requires most County contracts to be awarded in an open and competitive manner where all potential vendors have an equal chance at an award. Government procurement is a classic area for concern about potential conflicts of interest for public employees. This new provision would extend the normal prohibition on participation in a procurement matter to include a business or individual that the employee no longer has an economic interest in but has received compensation from in the last 12 months.

The Ethics Commission had requested a similar, but broader, prohibition on participation in any matter with a business that the employee had received compensation from in the prior 12 months earlier this year. See the Ethics Commission September 18 memorandum at ©21-28. Councilmember Friedson may introduce an amendment that would add the broader prohibition requested by the Ethics Commission. See Friedson Amendment 1 at ©29.

5. Should an employee be restricted from participating in a procurement with a potential vendor if the employee had an economic relationship with the vendor more than 12 months before the procurement process began?

Bill 42-20 would also require a public employee who participates in a procurement process with an individual or organization seeking to do business with the County that compensated the public employee for services performed more than 12 months before the participation began to disclose the prior relationship to the Procurement Director. While this is not a prohibition on participation, it is a requirement that the employee disclose his or her prior relationship with the potential vendor. This disclosure would increase transparency and provide the Procurement Director to decide if the participation of this employee in this process creates the appearance of a conflict.

6. Should an elected official or non-merit employee disclose the source of each fee greater than \$1,000 received for services in a financial disclosure statement?

Bill 42-20 would also add a new requirement for the content of an annual financial disclosure statement for an elected official or a non-merit employee. A public employee may engage in outside employment that includes providing services to individual clients as an employee of a business. Current law would require disclosure of the employment relationship with the business but not disclosure of each individual client served. Examples of these types of services include attorneys, accountants, massage therapists, hair stylists, and therapists. Requiring the disclosure of each client of a hair stylist would require a long list of individuals with little chance of a conflict of interest. Bill 42-20 would limit this requirement to the source of a fee greater than \$1,000 and require only elected officials and non-merit employees to add this to a disclosure statement. The Ethics Commission requested a similar amendment in its September 18 memorandum. See ©21-28.

This issue was considered by the Council in 2015 during the debate over the comprehensive amendments to the Ethics Law made by Bill 39-14, Ethics – Amendments. The Ethics Commission had requested a similar amendment in 2015. The staff action memorandum for Bill 39-14 describes this issue on p.12 and is included at ©30-44. The Council considered an amendment that would have required all financial disclosure filers to identify the source of income from individual clients if the fee was greater than \$5,000. The Council weighed the usefulness of this disclosure against the difficulty a filer might have in complying with it. Ultimately, the Council decided to reject this amendment when enacting Bill 39-14.

Bill 42-20 would impose a lower dollar limit (\$1,000 instead of \$5,000), but it would limit this requirement to elected officials and non-merit employees. Bill 42-20 would further limit this requirement by excluding the identification of a source of income if the filer and the source have a confidential relationship which creates a privilege against testifying under State law unless the source is also a restricted donor. Examples of such a confidential relationship would be the attorney-client relationship and the marriage relationship.

Under Code §19A-4:

- (o) *Restricted donor* means a person or business that:
 - (1) is registered or must register as a lobbyist under Section 19A-21;
 - (2) does business with the County agency with which the public employee is affiliated;
 - (3) is engaged in an activity regulated or controlled by the County agency with which the public employee is affiliated; or
 - (4) has a financial interest that may be substantially and materially affected in a manner distinguishable from the public generally by the performance or nonperformance of the public employee's duties.

If the source of the fee is not a restricted donor, there seems to be little use for the disclosure. However, if the source of the fee is a restricted donor, the potential for a conflict is much greater.

If the Committee wants to include this amendment, it could limit the disclosure to a fee greater than \$5000 from a restricted donor.

7. County Attorney's recommended amendment.

The County Attorney's Office found no legal issues with Bill 42-20 (©16). The County Attorney recommended that the use of the phrase "compensated the public employee in the previous 12 months for services performed for the organization or individual" be replaced with "employed the public employee in the previous 12 months." The reason would be that "employ" is already a defined term in the Ethics Law. We agree with this suggested amendment.

8. Fiscal Impact, Economic Impact, and Racial Equity and Social Justice Impact.

OMB estimated that the Bill would have no significant fiscal impact (©45-47). OLO expects that the Bill would have an insignificant impact on economic conditions in the County (©14-15). Finally, OLO also expects that the Bill would have a minimal impact on racial equity and social justice (©17-19).

This packet contains:	<u>Circle #</u>
Bill 42-20	1
Legislative Request Report	11
Councilmember Friedson Memorandum	13
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Bill No. 42-20
Concerning: Ethics – Public
Accountability and Transparency -
Amendments
Revised: 10/23/2020 Draft No. 6
Introduced: September 29, 2020
Expires: March 29, 2022
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

Lead Sponsor: Councilmember Friedson
Co-Sponsors: Councilmember Rice, Council President Katz, Councilmembers Glass and Navarro,
and Council Vice President Hucker

AN ACT to:

- (1) require the Executive to disclose employment contracts with non-merit appointees and non-merit employees to the Council;
- (2) include the sale or promotion of certain intellectual property by a public employee as other employment;
- (3) regulate the participation of a public employee who has received compensation from an individual or organization in a procurement with that individual or organization;
- (4) require a public employee to disclose certain sources of earned income in a financial disclosure statement;
- (5) prohibit the Chief Administrative Officer from engaging in other employment; and
- (6) generally amend the laws governing public accountability and trust.

By amending

Montgomery County Code
Chapter 1A, Structure of County Government
Section 1A-102

Chapter 19A, Ethics
Sections 19A-4, 19A-11, 19A-12, and 19A-19

Boldface	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

The County Council for Montgomery County, Maryland approves the following Act:

1 **Sec. 1. Sections 1A-102, 19A-4, 19A-11, 19A-12, and 19A-19, are amended**
 2 **as follows:**

3 **1A-102. Process for appointing and confirming officials.**

4 (a) *Chief Administrative Officer, County Attorney, heads of departments*
 5 *and principal offices, and other non-merit positions in the Executive*
 6 *Branch:*

7 (1) The County Executive may appoint a new Chief Administrative
 8 Officer, County Attorney, head of a department or principal
 9 office, or other position in the Executive Branch designated by
 10 law as a non-merit position at any time.

11 [a.] (A) If the Council confirms a new Chief Administrative
 12 Officer, head of a department or principal office, or person
 13 to any other position in the Executive Branch designated
 14 by law as a non-merit position, the new official
 15 automatically assumes the position from anyone who holds
 16 that position on an acting or permanent basis.

17 [b.] (B) The County Attorney has the right to have a public
 18 hearing before the Council prior to being dismissed by the
 19 County Executive. After this right has been satisfied, if the
 20 Council confirms a new County Attorney, the new County
 21 Attorney automatically assumes the position from anyone
 22 who holds that position on an acting or permanent basis.

23 (2) [a.] (A) If the position of Chief Administrative Officer, head
 24 of a department or principal office, or any other position in
 25 the Executive Branch designated by law as a non-merit
 26 position, is vacant, the County Executive must appoint
 27 someone to fill the vacancy.

28 [b.] (B) The County Executive should submit the
29 appointment to the Council within 90 days after the
30 vacancy occurs.

31 (3) [a.] (A) Within 60 days, the Council should vote on
32 confirmation of an appointment.

33 [b.] (B) The affirmative votes of a majority of
34 councilmembers in office are necessary to confirm an
35 appointment.

36 (4) If the Council votes on an appointment, does not confirm it, and
37 does not reconsider the vote, the County Executive must make a
38 new appointment. The County Executive should make the new
39 appointment within 90 days after the deadline for reconsidering
40 the vote.

41 (5) If the Council does not act on confirmation of an appointment
42 within 60 days, the Council may no longer vote on that
43 appointment. Within 90 days after the end of the sixty-day
44 period, the County Executive should either:

45 [a.] (A) Resubmit the appointment; or

46 [b.] (B) Submit a new appointment.

47 (6) The Executive must disclose to the Council:

48 (A) any proposed employment contract with a person appointed
49 to a non-merit position subject to confirmation by the
50 Council at the time of appointment; and

51 (B) any current employment contract with an employee serving
52 in a non-merit position subject to confirmation by the
53 Council.

54 * * *

55 **19A-4. Definitions.**

56 * * *

57 (g) *Employment or employ* means engaging in an activity for compensation,
 58 including the active sale or promotion for sale of intellectual property
 59 produced by the public employee, such as books, newspaper, magazine,
 60 or journal articles, videos, crafts, and artwork.

61 * * *

62 **19A-11. Participation of public employees.**

63 (a) *Prohibitions.* Unless permitted by a waiver, a public employee must not
 64 participate in:

65 (1) any matter that affects, in a manner distinct from its effect on the
 66 public generally, any:

67 (A) property in which the public employee holds an economic
 68 interest;

69 (B) business in which the public employee has an economic
 70 interest; or

71 (C) property or business in which a relative has an economic
 72 interest, if the public employee knows about the relative's
 73 interest;

74 (2) any matter if the public employee knows or reasonably should
 75 know that any party to the matter is:

76 (A) any business in which the public employee has an economic
 77 interest or is an officer, director, trustee, partner, or
 78 employee;

79 (B) any business in which a relative has an economic interest, if
 80 the public employee knows about the interest;

- 81 (C) any business with which the public employee has an active
 82 application, is negotiating, or has any arrangement for
 83 prospective employment;
- 84 (D) any business that is considering an application from,
 85 negotiating with, or has an arrangement with a relative about
 86 prospective employment, if the public employee knows
 87 about the application, negotiations, or the arrangement;
- 88 (E) any business or individual that is a party to an existing
 89 contract with the public employee or a relative, if the
 90 contract could reasonably result in a conflict between
 91 private interests and official duties;
- 92 (F) any business that is engaged in a transaction with a County
 93 agency if:
- 94 (i) another business owns a direct interest in the
 95 business;
- 96 (ii) the public employee or a relative has a direct interest
 97 in the other business; and
- 98 (iii) the public employee reasonably should know of both
 99 direct interests;
- 100 (G) any business that is subject to regulation by the agency with
 101 which the public employee is affiliated if:
- 102 (i) another business owns a direct interest in the
 103 business;
- 104 (ii) the public employee or a relative has a direct interest
 105 in the other business; and
- 106 (iii) the public employee reasonably should know of both
 107 direct interests; or

108 (H) any creditor or debtor of the public employee or a relative if
109 the creditor or debtor can directly and substantially affect an
110 economic interest of the public employee or relative[.];

111 (3) any case, contract, or other specific matter affecting a party for
112 whom, in the prior year, the public employee was required to
113 register to engage in lobbying activity under this Chapter[.]; or

114 (4) any part of a procurement process, formally or informally, with an
115 individual or organization seeking to do business with the County
116 that compensated the public employee in the previous 12 months
117 for services performed for the organization or individual.

118 * * *

119 (d) Procurement disclosure. A public employee who participates in a
120 procurement process with an individual or organization seeking to do
121 business with the County that compensated the public employee for
122 services performed more than 12 months before the participation began
123 must disclose the prior relationship to the Procurement Director. The
124 Procurement Director must include a statement of this disclosure in the
125 procurement file.

126 * * *

127 **19A-12. Restrictions on other employment and business ownership.**

128 * * *

129 (b) *Specific restrictions.* Unless the Commission grants a waiver under
130 subsection 19A-8(b), a public employee must not:

131 (1) be employed by, or own more than one percent of, any business
132 that:

133 (A) is regulated by the County agency with which the public
134 employee is affiliated; or

- 135 (B) negotiates or contracts with the County agency with which
136 the public employee is affiliated; or
- 137 (2) hold any employment relationship that could reasonably be
138 expected to impair the impartiality and independence of judgment
139 of the public employee.
- 140 (c) *Exceptions.*
- 141 (1) Subsections (a) and (b) do not apply to:
- 142 (A) a public employee who is appointed to a regulatory or
143 licensing body under a statutory provision that persons
144 subject to the jurisdiction of the body may be represented in
145 appointments to it;
- 146 (B) a public employee whose government duties are ministerial,
147 if the employment does not create a conflict of interest;
- 148 (C) a member of a board, commission, or similar body in regard
149 to employment held when the member was appointed if the
150 employment was publicly disclosed before appointment to
151 the appointing authority, and to the County Council when
152 confirmation is required. The appointing authority must
153 forward a record of the disclosure to the Commission, which
154 must keep a record of the disclosure on file; or
- 155 (D) an elected public employee in regard to employment held at
156 the time of election, if the employment is disclosed to the
157 County Board of Elections before the election. The
158 Commission must file the disclosure received from the
159 County Director of Elections with the financial disclosure
160 record of the elected public employee.

161 (2) If expressly authorized by regulation, subparagraph (b)(1)(A) and
162 paragraph (b)(2) do not prohibit a police officer from working
163 outside employment for an organization solely because that
164 organization is located in the County or in the district where the
165 officer is assigned.

166 (d) *Prohibition against unapproved employment.* Unless the Commission
167 permits it or subsections (a) and (b) do not apply, a person must not
168 knowingly employ a public employee.

169 (e) *Prohibition against contingent compensation.* A public employee must
170 not assist or represent a party for contingent compensation in a matter
171 before or involving a County agency except in a judicial or quasi-judicial
172 proceeding. However, a public employee may assist or represent a party
173 for contingent compensation in any matter for which contingent fees are
174 authorized by law.

175 (f) Chief Administrative Officer. A public employee must not engage in
176 other employment while serving as the Chief Administrative Officer.

177 **19A-19. Content of financial disclosure statement.**

178 * * *

179 (a) Each financial disclosure statement filed under Section 19A-17(a) must
180 disclose the following:

181 * * *

182 (8) *Sources of earned income.*

183 (A) The statement must list the name and address of:

184 (i) each employer of the filer, other than the County
185 Government;

186 (ii) each employer of a member of the filer’s immediate
187 family; [and]

188 (iii) each business entity of which the filer or a member
 189 of the filer's immediate family was a sole or partial
 190 owner and from which the filer or member of the
 191 filer's immediate family received earned income at
 192 any time during the reporting period; and

193 (iv) for an elected official or a non-merit County
 194 employee, the source of each fee greater than \$1,000
 195 for services provided by the filer during the reporting
 196 period. A filer does not need to include any
 197 information with respect to any person for whom
 198 services were provided by any firm or association of
 199 which the filer was a member, partner, or employee
 200 unless the filer was directly involved in providing
 201 those services.

202 (B) The filer need not disclose a minor child's employment or
 203 business ownership if the agency with which the filer is
 204 affiliated does not regulate, exercise authority over, or
 205 contract with the place of employment or business entity of
 206 the minor child.

207 (C) Unless the source of a fee greater than \$1,000 is a restricted
 208 donor, a filer subject to subparagraph (A)(iv) does not need
 209 to disclose the identity of a source of a fee for services if the
 210 source and the filer have a confidential relationship which
 211 creates a privilege against testifying under State law. The
 212 filer must identify a restricted donor source who has a
 213 confidential relationship with the filer confidentially as
 214 prescribed by the Commission.

215 * * *

216 **Sec. 2. Name.**

217 This Act must be known as the Public Accountability and County Transparency
218 (PACT) Act.

219 *Approved:*

220

Sidney Katz, President, County Council Date

221 *Approved:*

222

Marc Elrich, County Executive Date

223 *This is a correct copy of Council action.*

224

Selena Mendy Singleton, Esq., Clerk of the Council Date

LEGISLATIVE REQUEST REPORT

Bill 42-20

Ethics – Public Accountability and Transparency – Amendments

DESCRIPTION:	Bill 42-20 would: <ul style="list-style-type: none">• require the Executive to disclose a proposed employment contract with an appointee to a non-merit position and any employment contract with an employee currently serving in a non-merit position to the Council;• include the sale or promotion of certain intellectual property by a public employee as other employment;• prohibit a public employee who has received compensation from an individual or organization in the previous 12 months from participating in a procurement with that individual or organization;• require a public employee who participates in a procurement process with an individual or organization seeking to do business with the County that compensated the public employee for services performed more than 12 months before the participation began to disclose the prior relationship to the Procurement Director;• require an elected official or non-merit employee to disclose, with some exceptions, the source of each fee greater than \$1,000 received for services in a financial disclosure statement; and• prohibit the Chief Administrative Officer from engaging in other employment.
PROBLEM:	Recent ethics issues have raised the need to review the Ethics Law.
GOALS AND OBJECTIVES:	Public accountability and County transparency.
COORDINATION:	County Attorney, Ethics Commission
FISCAL IMPACT:	Office of Management and Budget
ECONOMIC IMPACT:	OLO
EVALUATION:	To be determined.

EXPERIENCE ELSEWHERE: To be researched.

SOURCE OF INFORMATION: Robert H. Drummer, Senior Legislative Attorney

APPLICATION WITHIN MUNICIPALITIES: Not applicable.

PENALTIES: Class A violation.

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MONTGOMERY COUNTY COUNCIL
ROCKVILLE, MARYLAND

September 22, 2020

FROM: Councilmember Andrew Friedson *Andrew Friedson*
TO: Council colleagues
SUBJECT: Bill 42-20, Public Accountability and County Transparency (PACT) Act
Bill 43-20, Non-merit Employees – Merit System Employees – Severance Pay – Limited

Dear colleagues,

Our only currency in public life is public trust. The residents we're so fortunate to represent deserve and expect County officials to follow the highest ethical standards. The work of local government depends on it. On September 29, I will introduce two bills to strengthen trust, accountability, and transparency in County government by improving the County's Ethics Law, requiring the disclosure of all compensation for County leaders, and ending the practice of discretionary severance pay for public employees.

Bill 42-20, the Public Accountability and County Transparency (PACT) Act, would more effectively guard against County employees using their positions of public service for private gain. The Bill would:

- Define the sale or promotion of intellectual property such as books, videos, and artwork as other employment in County Ethics Law, requiring financial disclosure;
- Prohibit the Chief Administrative Officer from other employment;
- Prohibit a County employee who in the previous year was compensated by a company seeking to do business with the County from participating in any way in that procurement process;
- Require a County employee involved in the procurement process who before the previous year was compensated by a company seeking to do business with the County to disclose that prior relationship to the procurement supervisor;
- Require non-merit employees and elected officials to include in financial disclosures sources of fees of more than \$1,000 in other employment;
- Require the disclosure of proposed contracts for appointed non-merit positions to Council at time of appointment; and
- Require the disclosure of contracts for current non-merit employees in Council-confirmed positions.

Bill 43-20, Non-merit Employees – Merit System Employees – Severance Pay – Limited, would end the practice of using taxpayer dollars to compensate public employees in an unregulated and often undisclosed fashion. The bill would prohibit discretionary severance pay for all County employees and prohibit separation pay for an employee who admits to violating or was found to have violated the Ethics Law in the year prior to separation.

I would welcome your co-sponsorship of this legislation and any questions you may have. Thank you for your consideration and commitment to government accountability and transparency.

STELLA B. WERNER OFFICE BUILDING • 100 MARYLAND AVENUE, 6TH FLOOR, ROCKVILLE, MARYLAND 20850
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WWW.MONTGOMERYCOUNTYMD.GOV

Economic Impact Statement

Office of Legislative Oversight

BILL 42-20 **Ethics – Public Accountability and Transparency – Amendments**

SUMMARY

The Office of Legislative Oversight (OLO) expects Bill 42-20 to have an insignificant impact on economic conditions in Montgomery County.

BACKGROUND

The goal of Bill 42-20 is to improve public accountability and County transparency. If enacted, the Bill would make the following changes to County law:

- “require the Executive to disclose a proposed employment contract with an appointee to a non-merit position and any employment contract with an employee currently serving in a non-merit position to the Council;
 - include the sale or promotion of certain intellectual property by a public employee as other employment;
 - prohibit a public employee who has received compensation from an individual or organization in the previous 12 months from participating in a procurement with that individual or organization;
 - require a public employee who participates in a procurement process with an individual or organization seeking to do business with the County that compensated the public employee for services performed more than 12 months before the participation began to disclose the prior relationship to the Procurement Director;
 - require an elected official or non-merit employee to disclose, with some exceptions, the source of each fee greater than \$1,000 received for services in a financial disclosure statement; and
 - prohibit the Chief Administrative Officer from engaging in other employment.”¹
-

METHODOLOGIES, ASSUMPTIONS, AND UNCERTAINTIES

No methodologies were used in this statement. The assumptions underlying the claims made in the subsequent sections are based on the judgment of OLO staff.

VARIABLES

Not applicable.

¹ Montgomery County Council, Bill 42-20, Ethics – Public Accountability and Transparency – Amendments, Introduced on September 29, 2020, Montgomery County, Maryland, 11.

Economic Impact Statement

Office of Legislative Oversight

IMPACTS

WORKFORCE ▪ TAXATION POLICY ▪ PROPERTY VALUES ▪ INCOMES ▪ OPERATING COSTS ▪ PRIVATE SECTOR CAPITAL INVESTMENT ▪ ECONOMIC DEVELOPMENT ▪ COMPETITIVENESS

Businesses, Non-Profits, Other Private Organizations

OLO believes that Bill 42-20 would have little to no impact on private organizations in the County in terms of the Council's priority indicators, namely workforce, operating costs, capital investments, property values, taxation policy, economic development and competitiveness.²

Residents

OLO believes that Bill 42-20 would have little to no impact on County residents in terms of the Council's priority indicators.

WORKS CITED

Montgomery County Council. Bill 10-19, Legislative Branch – Economic Impact Statements – Amendments. Enacted on July 30, 2019. Montgomery County, Maryland.

Montgomery County Council. Bill 42-20, Ethics – Public Accountability and Transparency – Amendments. Introduced on September 29, 2020. Montgomery County, Maryland.

CAVEATS

Two caveats to the economic analysis performed here should be noted. First, predicting the economic impacts of legislation is a challenging analytical endeavor due to data limitations, the multitude of causes of economic outcomes, economic shocks, uncertainty, and other factors. Second, the analysis performed here is intended to *inform* the legislative process, not determine whether the Council should enact legislation. Thus, any conclusion made in this statement does not represent OLO's endorsement of, or objection to, the bill under consideration.

CONTRIBUTIONS

Stephen Roblin (OLO) drafted this economic impact statement.

² For the Council's priority indicators, see Montgomery County Council, Bill 10-19 Legislative Branch – Economic Impact Statements – Amendments, Enacted on July 30, 2019, Montgomery County, Maryland, 3.



OFFICE OF THE COUNTY ATTORNEY

Marc Elrich
County Executive

Marc P. Hansen
County Attorney

MEMORANDUM

TO: Fariba Kassiri,
Deputy Chief Administrative Officer

FROM: Edward B. Lattner, Chief *Edward B. Lattner*
Division of Government Operations
Office of the County Attorney

DATE: October 12, 2014

RE: **Bill 42-20, Ethics - Public Accountability and Transparency - Amendments**

Bill 42-20 makes several changes to the County's ethics law. There are no legal issues.

We do have one suggestion. The phrase "compensated the public employee in the previous 12 months for services performed for the organization or individual" in lines 116-17 should be replaced with "employed the public employee in the previous 12 months." The term "employ" is already a defined term in the ethics law, meaning to engage in an activity for compensation. For the same reason, the phrase "compensated the public employee for services performed" in lines 121-22 should be replaced with "employed the public employee."

ebl

cc: Robert H. Drummer, Senior Legislative Attorney
Marc P. Hansen, County Attorney
Dale Tibbitts, Special Assistant to the CE
Robert Cobb, Staff Director/Chief Counsel, Ethics Commission
Tammy J. Seymour, OCA

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Racial Equity and Social Justice (RESJ) Impact Statement

Office of Legislative Oversight

BILL 42-20: PUBLIC ACCOUNTABILITY AND TRANSPARENCY-AMENDMENTS

SUMMARY

The Office of Legislative Oversight (OLO) expects Bill 42-20 to have a minimal impact on racial equity and social justice among Montgomery County Government (MCG) employees and the County at large.

BACKGROUND

The County Council introduced Bill 42-20 on September 29, 2020. Bill 42-20 primarily seeks to enhance public accountability and transparency of non-merit (i.e., appointed) employees in the County by requiring them to disclose outside financial relationships.¹ It is designed to strengthen the County's Ethics Law, focusing on avoiding conflicts of interest and sustaining public trust.² If implemented, it would make the upcoming modifications to County Law:

- Require the Executive to disclose a proposed employment contract with an appointee to a non-merit position and any employment contract with an employee currently serving in a non-merit position to the Council;
- Include the sale or promotion of certain intellectual property by a public employee as other employment;
- Prohibit a public employee who has received compensation from an individual or organization in the previous 12 months from participating in procurement with that individual or organization;
- Require a public employee who participates in a procurement process with an individual or organization seeking to do business with the County that compensated the public employee for services performed more than 12 months before the participation began to disclose the prior relationship to the Procurement Director;
- Require an elected official or non-merit employee to disclose, with some exceptions, the source of each fee greater than \$1,000 received for services in a financial disclosure statement; and
- Prohibit the Chief Administrative Officer from engaging in other employment.³

DEMOGRAPHIC DATA

Understanding the impact of Bill 42-20 on racial equity and social justice in the County requires understanding the demographics of the County's workforce as compared to residents. There are four major categories of MCG employees:

- **Seasonal and temporary employees** that include lifeguards, camp counselors, cashiers and front-desk staff. Seasonal employees earn the minimum wage; temporary employees can work for up to 1,040 hours annually.
- **Merit permanent employees** covered by the Merit Protection Board, including administrative support, service/maintenance, technicians, paraprofessionals, protective service workers and professionals.
- **Management Leadership Service employees** that represent the subset of permanent, merit employees that serve as managers and administrators in the Legislative and Executive Branches.

RESJ Impact Statement

Bill 42-20

- **Non-merit, appointed employees** who account for the senior-most positions in the Montgomery County government. They include department directors, senior advisors, and confidential aides.

Table 1: Montgomery County Residents and Government (MCG) Workforce by Race and Ethnicity

Race and Ethnicity	County Residents	Seasonal & Temporary Employees	Merit Permanent Employees	Management Leadership Service	Non-Merit (Appointed) Employees
White	55%	33%	48%	64%	37%
Black	21%	37%	27%	19%	9%
Latinx	20%	15%	11%	6%	6%
Asian	17%	6%	7%	6%	3%
Other/Non-Reported	11%	6%	8%	5%	46%
Total Number	1,050,688	3,014	9,381	396	89

Sources: American Community Survey, 2019; Montgomery County Personnel Management Review, 2020; and Montgomery County Office of Human Resources Unpublished Data on Non-Merit Positions, 2020

An analysis of data comparing the race and ethnicity of County residents to MCG personnel groups shows that:

- Black employees are over-represented among seasonal, temporary and merit permanent MCG employees compared to their resident population, but they are proportionately represented among MLS employees.
- White employees are under-represented among seasonal, temporary, and merit permanent MCG employees compared to their resident population, but over-represented among MLS employees.
- Latinx and especially Asian employees are under-represented among every MCG employee group compared to their resident populations.

The over-representation of Black employees among seasonal, temporary and non-managerial merit positions and the over-representation of White employees among managerial positions are consistent with the occupational segregation that characterizes the U.S. workforce.⁴ However, it's unclear whether occupational segregation by race and ethnicity characterizes non-merit, appointed positions in the County because nearly half of employees in these positions (46%) did not disclose their race or ethnicity or selected "Other." Nevertheless, the known racial and ethnic makeup of MLS employees suggests that White employees are also over-represented among the 89 non-merit positions that would most be impacted by Bill 42-20.

ANTICIPATED RESJ IMPACTS

Montgomery County Employees: Since the racial and ethnic makeup of non-merit employees remains unknown, the RESJ impact of Bill 42-20 remains undetermined. An analysis of MLS demographics, however, suggests that White employees are likely to be disproportionately impacted by the proposed amendments to County law because they likely account for a majority of non-merit employees.⁵ Yet, since non-merit employees account for less than one percent of MCG's overall workforce, the impact of Bill 42-20 on the MCG workforce as a whole is negligible.

RESJ Impact Statement

Bill 42-20

METHODOLOGIES, ASSUMPTIONS, AND UNCERTAINTIES

This RESJ impact statement and OLO's analysis relies on several sources of information, including: the American Community Survey;⁶ Montgomery County Management Personnel Management Review;⁷ Montgomery County Non-Merit Demographics;⁸ and OLO economic impact statement Bill 42-20.⁹

RECOMMENDED AMENDMENTS

The County's Racial Equity and Social Justice Act requires OLO to consider whether recommended amendments to bills aimed at narrowing racial and social inequalities are warranted in developing RESJ impact statements.¹⁰ If the goal of Bill 42-20 was to directly address racial and ethnic disparities in the Montgomery County Government workforce, OLO could offer such amendments. However, the purpose of Bill 42-20 is not to decrease racial and social inequities in County government or the County overall. As such, this RESJ impact statement does not offer recommended amendments.

CAVEATS

Two caveats to this racial equity and social justice impact statement should be noted. First, predicting the impact of legislation on racial equity and social justice is a challenging, analytical endeavor due to data limitations, uncertainty, and other factors. Second, this RESJ statement is intended to inform the legislative process rather than determine whether the Council should enact legislation. Thus, any conclusion made in this statement does not represent OLO's endorsement of, or objection to, the bill under consideration. Since the universe of positions impacted by Bill 42-20 is minuscule compared to the MCG workforce as a whole, OLO finds that it does not impact RESJ in government employment or the County overall.

CONTRIBUTIONS

OLO staffers Dr. Theo Holt and Dr. Elaine Bonner-Tompkins drafted this RESJ statement.

¹ Bill 42-20, Ethics-Public Accountability and Transparency-Amendments, Montgomery County, MD.

² Ibid

³ Ibid

⁴ Equitable Growth, U.S. Occupational Segregation by Race, Ethnicity, and Gender, July 2020 <https://equitablegrowth.org/wp-content/uploads/2020/07/063020-occup-seg-fs.pdf>

⁵ Montgomery County Personnel Management Review, April 2020

<https://www.montgomerycountymd.gov/HR/Resources/Files/Classification/Compensation%20Documents/PMR%202020%2004072020.pdf>

⁶ American Community Survey Demographic and Housing Estimates, Montgomery County, Maryland, 2019 (1 Year Estimates) Table DP05 <https://data.census.gov/cedsci/table?q=montgomery%20county%20maryland&tid=ACSDP1Y2019.DP05&hidePreview=true>

⁷ Montgomery County Personnel Management Review, April 2020

⁸ Unpublished data from Office of Human Resources shared with OLO on October 10, 2020

⁹ Stephen Roblin, Bill 42-20 Legislative Branch- Economic Impact Statement, Office of Legislative Oversight, October 2020.

¹⁰ Montgomery County Council, Bill No. 27-19 Racial Equity and Social Justice, Montgomery County, MD.

TESTIMONY ON BEHALF OF COUNTY EXECUTIVE MARC ELRICH
Bill 42-20, Ethics – Public Accountability and Transparency - Amendments
Before the Montgomery County Council
October 20, 2020

Good afternoon Council President Katz, Vice-President Hucker and Councilmembers, for the record my name is Dale Tibbitts, Special Assistant to County Executive Marc Elrich. It is my pleasure to appear before the Council on behalf of the County Executive to provide brief testimony on Bill 42-20. The County Executive fully supports this Bill.

The County Executive is firmly committed to ensuring transparency in our government. This includes holding all non-merit employees to a high standard of ethical conduct. The County Executive believes this bill takes appropriate measures to ensure that our highest level employees avoid conflicts of interest and are fully committed to serving our community.

We look forward to working with the Council on this legislation.



MONTGOMERY COUNTY ETHICS COMMISSION

Memorandum

September 18, 2020

TO: Sidney Katz, President, Montgomery County Council

FROM: Montgomery County Ethics Commission
Robert Cobb, Staff Director, Chief Counsel *RWC*

CC: Marc Elrich, County Executive

SUBJECT: Ethics Commission Recommendations for Amendments to the County's Public Ethics Law

The Montgomery County Ethics Commission recommends the adoption of several changes to County law. The text of the proposed amendments is attached as Attachment A. These changes are being recommended as result of the Commission's experience in administering the County's Public Ethics Law and to promote compliance with ethics law requirements.

The proposed changes are explained as follows:

19A-4 (g). A change to the definition of the term "employment" is proposed to clarify that sales and promotion of arts, crafts, and writing constitute "employment" which trigger the outside employment approval process and other requirements of the ethics law. Without the clarification, some might be confused as to whether these types of activities fall under the requirement.

19A-5(f)(4)(B). The proposed change allows for the Commission to hire outside counsel and use available funding to pay for outside counsel without seeking approval from the County Council. This change is to allow the Commission to proceed as independently as possible in the conduct of its investigative and enforcement roles. In politically sensitive matters, such as, in theory, allegations against an elected official or its senior staff, the Commission does not want to be in the position of having to request additional funds to hire outside counsel to investigate or prosecute such a matter.

19A-6(a)(6). The Commission believes it advisable to require ethics training, especially for the County's more senior officials. Certain training is already conducted in the discretion of authorities other than the Commission, but ethics training is not currently mandated by the ethics law. Public officials in the most visible positions often do not participate in training that is offered. Through the statutory change, ethics training can be administered in a programmatic fashion that provides assurance that employees have exposure to ethics requirements.

19A-6(c), 19A-6(d), 19A-10(a)(4). These proposed changes are to make clear that the Commission has complete discretion over whether to investigate a matter and set a matter for hearing; the only person who may appeal a decision of the Commission is the subject of a complaint or a person aggrieved by a decision of the Commission regarding a request for a waiver or a request for outside employment approval. This change is needed because decisions of the Commission to dismiss complaints have been appealed to the Circuit Court with the consequential waste of County resources to defend the dismissals. One of the dismissals of the Circuit Court appeals was subsequently appealed to the Court of Special Appeals, where the Circuit Court order to dismiss the case was affirmed. The change in the law conforms to the decisions of the courts that there is no right of appeal to complainants, though this conclusion is not clear on the face of the law as currently written. Also, the change to the law would bring the County's ethics law into accord with the State ethics law which does not give a person bringing an ethics complaint a right to appeal to Maryland Courts a decision of the State Ethics Commission with which the complainant does not agree.

19A-10(n). This change would provide the opportunity to the Commission to inform appointing officials of information relating to pending matters of the Commission without violating confidentiality provisions of the ethics law. Current law generally limits communications from the Ethics Commission regarding matters relating to allegations and investigations. The change would allow communications to take place in the discretion of the Commission so that, for example, administrative action can occur pending Ethics Commission resolution of the matter.

19A-11(a)(2)(F). This change would apply the conflict of interest prohibitions to prohibit an employee from working for any person that the employee had been an employee of or otherwise was affiliated with in specified capacities in the prior year. This would apply to new County employees with respect to prior affiliations and current public employees who may have terminated an outside affiliation in the prior year. The concern is that a County employee would not be impartial towards a person or entity that the employee had a recent affiliation with.

19A-11(c)(4). The changes here are to keep benign circumstances from inadvertently catching those with limited interests in large companies from violating the ethics law. While it may be that employees engage in matters that affect large companies, it would be the extremely unusual case where action of Montgomery County government has such an impact on a company that such action would materially affect the stock price of the company. This exclusion would not extend to any company with a headquarters located in or proposed to be located in Montgomery County. Moreover, the extent of the exclusion from coverage would be limited by dollar thresholds. The exclusion would not apply to stock options or other derivatives. In the event a public employee demonstrably intended a benefit to himself or others due to a stock ownership interest in a company, even where the matter fell under the exclusion, it might still constitute

a violation of 19A-14(a). The exclusion distinguishes between work on matters involving parties from matters of general applicability, with the latter subject to a higher dollar threshold for exclusion from coverage.

19A-12(c)(1)(D). This change eliminates the exception for elected officials from the prohibitions on outside employment and business ownership. The Commission can think of no valid reason that elected officials should be held to a lesser ethics standard than other County employees as regards the prohibition on outside employment with certain entities and the requirement for approval of outside employment. It could be that the law incorporates the notion that the public “knowingly” elects persons with relationships. This attribution of rationale to the electorate is built on multiple fallacies as the electorate is not going to be aware of the existence of or extent of relationships between an elected official’s outside employer (assuming that is known at all) and County agencies. Maybe there was some rationale for the special treatment when some County Councilmembers were deemed part-time employees, but County Councilmembers are now “Full-Time employees”. The existence of the provision and allowance for certain outside employment also creates a challenge to the Ethics Commission with respect to applications from Council members who do not benefit from the provision. How can the Commission step in to deny outside approval in one instance while other outside employment (that may be just as or more objectionable) is allowed to proceed under the statutory exception? The deletion of this provision is not intended to affect any existing outside employment.

19A-16(d). The proposed change to 19A-16(d)(3) is a technical change to make clear that cash and cash equivalents are never acceptable gifts.

19A-18(h). The change to 19A-18(h) is to put the responsibility to inform Council, upon its request, of the list of financial disclosure filers upon the Commission itself, as the Commission is where this information is managed.

19A-19(a)(8)(A)(iv). This provision requires that current employees with outside employment disclose the sources of compensation of \$5000 or more. This is to establish transparency into who is making payments to public employees in their outside employment activities. Information that is protected by law from being disclosed is not required to be disclosed, unless it falls into categories that suggest a potential for conflict of interest or other ethics issues, in which case the information is required to be disclosed confidentially.

If there are questions about these recommendations, please contact Robert Cobb at Robert.cobb@montgomerycountymd.gov or at 240-777-6674. Mr. Cobb will work with Council staff to ensure the proposal meets formatting requirements for proposed legislation. The Commission anticipates that there will be a number of different perspectives and considerations in addressing these proposed changes and other changes to the Public Ethics Law that may be considered along with these proposed changes. The Commission looks forward to working with the Council to improve the County’s ethics laws.

Attachment A

Sections 19A-4, 19A-5, 19A-6, 19A-10, 19A-11, 19A-12, 19A-16, 19A-18, and 19A-19 are amended as follows:

Sec. 19A-4. Definitions.

(g) *Employment or employ* means engaging in an activity for compensation, including active sales or promotion of public employee produced intellectual property such as articles, books, crafts and artwork.

Sec. 19A-5. Ethics Commission.

(f) *Administrative Support.*

(4) The Commission may retain legal services from persons outside the Office of the County Attorney and without the approval of the County Attorney if:

(A) the Commission finds that obtaining independent legal services is necessary for the Commission effectively to perform its responsibilities; and

(B) [the County Council approves the Commission's decision to select legal counsel and appropriates] the Ethics Commission has funds appropriated to it or is further appropriated, transferred, or reprogrammed sufficient funds to cover the cost of the legal services.

Sec. 19A-6. Authority and duties of Commission; appeal of Commission decisions.

(a) *Authority.* The Commission may:

(6) conduct public education and information programs regarding the purpose and implementation of this Chapter[;] and require public employees to attend a training course of at least one hour on the requirements of the Public Ethics at such times and given by such person as the Commission determines, and for those public employees who are required to file financial disclosure statements pursuant to 19A-17 of this chapter, require training not less than once every three years, and the Commission can exempt from this requirement those persons identified in 19A-17(b)(6)-(9) and 19A-17(c)(2) and those in uncompensated positions. Persons

who are elected to County Executive or County Council shall receive a training course within 30 days of the date of election unless that person has otherwise received training under this paragraph within the prior three years of the election or such shorter period as the Commission determines.

(c) Appeals. The subject of a [A] final decision finding of a violation by [of] the Commission on a complaint, or a person aggrieved by a final decision on a request for a waiver[,] or request for other employment approval may [be] appeal[ed] the decision to the Circuit Court under the applicable Maryland Rules of Procedure governing judicial review of administrative agency decisions. An appeal does not stay the effect of the Commission's decision unless the court hearing the appeal orders a stay. Any party aggrieved by a judgment of the Circuit Court may appeal that judgment to the Court of Special Appeals.

(d) *Request for rehearing or reconsideration.*

(1) The subject of a final decision finding of a violation by the Commission on a complaint or a [A] person [affected] aggrieved by a final decision of the Commission on a [complaint,] request for waiver[,] or request for other employment approval may ask the Commission for a rehearing or reconsideration.

Sec. 19A-10. Complaint; Adjudicatory Hearing.

(a) *** (4) If the complaint does not allege facts sufficient to state a violation of this Chapter or the Commission finds that dismissal is consistent with the purposes of this title, the Commission may dismiss the complaint. The Commission must inform the complainant of its decision to dismiss the complaint. The Commission may inform the subject of the complaint that the complaint was filed and dismissed, but must not disclose the identity of the complainant.

(n) The Commission may, at any time, refer to an appropriate prosecuting attorney any information that indicates that a criminal offense may have occurred. The Commission may, at any time, share confidential information with an employee's appointing official and the County Attorney.

Sec. 19A-11. Participation of public employees.

(a) *Prohibitions.* Unless permitted by a waiver, a public employee must not participate in:

(2) any matter if the public employee knows or reasonably should know that any party to the matter is:

(F) any business in which, in the prior year, the employee was an officer, director, trustee, partner, agent, attorney, consultant, contractor or employee.

(G[F]) any business that is engaged in a transaction with a County agency if:

(H[G]) any business that is subject to regulation by the agency with which the public employee is affiliated if:

(I[H]) any creditor or debtor of the public employee or a relative if the creditor or debtor can directly and substantially affect an economic interest of the public employee or relative.

(c) *Thresholds.* In this section, interest or economic interest means:

(4) any other economic interest worth more than \$1,000, except, with respect to businesses whose principal place of business is not in or proposed to be in Montgomery County,

- i) an employee may participate in any matter involving parties in which the interest arises from the ownership of securities issued by one or more entities affected by the matter, if the securities are publicly traded, the company is one of the 500 hundred largest capitalized companies (on the S&P 500 stock market index), and the aggregate market value of the holdings in the securities of all affected entities does not exceed \$25,000; or
- ii) an employee may participate in any matter of general applicability which would otherwise be prohibited by (a)(1) of this section in which the interest arises from the ownership of securities issued by one or more entities affected by the matter, if the securities are publicly traded, and the market value of the holdings in the securities of all affected entities does not exceed \$50,000.

Sec. 19A-12. Restrictions on other employment and business ownership.

(c) *Exceptions.*

(1) Subsections (a) and (b) do not apply to:

[(D) an elected public employee in regard to employment held at the time of election, if the employment is disclosed to the County Board of Elections before the election. The Commission must file the disclosure received from the County Director of Elections with the financial disclosure record of the elected public employee.]

Sec. 19A-16. Soliciting or accepting gifts.

(d) Subsection (c) does not apply to:

(3) unsolicited gifts excluding cash or cash equivalents [of nominal value] that do not exceed \$20 in cost [, or trivial items of informational value];

Sec. 19A-18. Financial disclosure statement; procedures.

(h) The Chief Administrative Officer must establish and maintain an electronic system to facilitate filing of and public access to financial disclosure statements required under this Article. Any electronic system must report an accurate list of each public employee required to file a statement under Section 19A-17, whether the employee is required to file under subsections 19A-17(a), (b), or (c), and include the employee's position, necessary contact information, the reviewer, and whether the report is an initial, annual, or final report. This list should be current and correspond to personnel records and records of memberships in boards, committees and commissions. Any electronic system must be able to generate reports upon request of the Chief Administrative Officer, the Council Administrator, or the Commission detailing who is required to file and the current state of compliance by public employees with financial disclosure filing and review requirements under this Article. [The County Executive must annually, or more frequently as requested,] The Ethics Commission shall, upon request, provide the list of employees designated to file financial disclosure reports to the Council. The Commission must make all necessary accommodations for any person who does not have access to the electronic system.

Sec. 19A-19. Content of financial disclosure statement.

(a) Each financial disclosure statement filed under Section 19A-17(a) must disclose the following:

(8) *Sources of earned income.*

(A) The statement must list the name and address of:

(iv) for reports filed by full-time employees pursuant to 19A-18(a)(1) and (a)(3), each source of compensation or fees of \$5000 or more for services provided by the filer during the reporting period. The preceding sentence shall not require any filer to include in a statement any information with respect to any person for whom services were provided by any firm or association of which such filer was a member, partner, or employee unless such filer was directly involved in the provision of such services. If a source of earned income and the filer have a confidential relationship which creates a privilege against testifying under state law, the filer need not report the identity of the source unless the source: (i) is registered or must register as a lobbyist on a matter that is or could be considered by the County agency with which the filer is affiliated; (ii) does business with the County agency with which the filer is affiliated; (iii) owns or operates a business that is regulated by the County agency with which the filer is affiliated; or (iv) has an economic interest that is different from the public interest which the filer may substantially affect in performing the filer's official duties, in which case, the identity of the source shall be disclosed confidentially to the Commission in a manner prescribed by the Commission.

Friedson Amendment 1 (Conflicts - Participation)

Amend lines 100 to 117 as follows:

- (G) any business that is subject to regulation by the agency with which the public employee is affiliated if:
 - (i) another business owns a direct interest in the business;
 - (ii) the public employee or a relative has a direct interest in the other business; and
 - (iii) the public employee reasonably should know of both direct interests; ~~[[or]]~~
- (H) any creditor or debtor of the public employee or a relative if the creditor or debtor can directly and substantially affect an economic interest of the public employee or relative~~[.];~~ or
- (I) any business or individual that in the previous 12 months compensated the employee for services performed for that business or individual; or
- (J) any business in which the employee was an officer, director, trustee, or partner in the previous 12 months;
- (3) any case, contract, or other specific matter affecting a party for whom, in the prior year, the public employee was required to register to engage in lobbying activity under this Chapter~~[.]~~ ~~[[;~~ or
- (4) any part of a procurement process, formally or informally, with an individual or organization seeking to do business with the County that compensated the public employee in the previous 12 months for services performed for the organization or individual]].

* * *

MEMORANDUM

TO: County Council

FROM: Robert H. Drummer, Senior Legislative Attorney 

SUBJECT: **Worksession/Action:** Bill 39-14, Ethics - Amendments

Bill 39-14, Ethics - Amendments, sponsored by the Council President at the request of the Ethics Commission, was introduced on July 29, 2014. A public hearing was held on September 16, at which the County Attorney, representing the County Executive, and the Chair and Staff Director of the County Ethics Commission appeared (see County Executive testimony on ©55).

Bill 39-14 would revise provisions of the County Ethics Law governing financial disclosure and solicitation and acceptance of gifts, mainly to meet certain requirements of State law. See the transmittal letter from the Ethics Commission for details (©37-40). For further analysis of the Bill and how it relates to the State requirements, see the Bill review letter from the County Attorney on ©41-54.

Background

The County Attorney's bill review memo on ©41-54 well describes how the requirements of the State Ethics Law are applied to the County Ethics Law, and how those requirements for elected officials in particular have been affected by recent amendments to the underlying State law.¹ *We will not attempt in this memo to repeat or summarize the analysis of either the County Ethics Commission in its transmittal memo on ©37-40 or the County Attorney in his bill review memo; we urge Councilmembers to read both closely, particularly the County Attorney's State law background discussion on ©41-43.* Briefly, the standards set by the State law are that the County law must be "**similar**" to the State law for all public employees except elected officials, and must be "**equivalent to or exceed the requirement of**" State law for elected officials (County Executive and Councilmembers).

¹For the State laws which articulate the standards that the County law must meet, see §§5-808 and 5-809 of a new General Provisions (GP) Article of the Maryland Code at ©56-56a.

In both cases, the State law allows the County to modify its law “to the extent necessary to make the provisions **relevant to the prevention of conflicts of interest in that jurisdiction**”. Staff of the State Commission apparently interprets the latter phrase to only allow those modifications of County law that would make the County law more stringent than the State law; however, that is not what this proviso says. In Council staff’s view, the primary goal of the County Ethics Law generally, and this Bill specifically, should be to improve the County law and make it clearer, more effective, and easier to apply and enforce, rather than simply conform it to the State law in every detail.

Given the recent State law amendments, an issue that pervades this Bill is how much to differentiate elected officials (County Executive and Councilmembers) from other public employees for purposes of gift solicitation and receipt and financial disclosure. **Council staff’s view is that, as it has to date, the County Ethics Law should as a general rule treat all public employees as equally as possible, and variations should be made for elected officials (or any other employee subset) only when State law or the nature of their positions clearly so requires.**

The Bill was scheduled for a worksession before the Government Operations and Fiscal Policy Committee on July 2, 2015. After Council staff had prepared a worksession packet, the Council President decided that this Bill should instead be reviewed and acted on by the entire Council without a Committee recommendation. This memo will include an update of the discussions of the issues among Council staff, County Ethics Commission staff, and the Executive Branch occurring after the cancelled July 2 worksession.

Staff Amended Bill

Council staff, working with the County Attorney’s Office, prepared an amended Bill with our joint recommendations. See ©65-103. As each of the issues is discussed, we will refer to the appropriate lines of the Staff Amendment so the Council can see how we recommend each issue be resolved. We also received a memorandum from the County Ethics Commission outlining 6 objections to proposed changes in the Staff Amendment. See the June 29 memorandum at ©104-106. We will discuss the position of the County Ethics Commission where appropriate in this packet.

County Ethics Commission Comments

Although all 6 objections made by the County Ethics Commission were characterized as objections to changes proposed by Council staff, 2 of the objections were to provisions that they had proposed in the Bill as introduced and were left unchanged by the Staff Amendment. None of the 6 objections from the County Ethics Commission involved changes proposed in the Bill to conform to State law. Each of the 6 positions outlined in the June 29 memorandum would make the County law stricter than the State Ethics Law.

Last week, Council staff met with the Staff Director and Chief Counsel for the County Ethics Commission to work out alternative amendments for Council consideration for each of the provisions in the Staff Amendment the County Ethics Commission opposed. Each of these amendments will be presented as an alternative to the recommendations described in the issues for Council decision.

County Executive's Comments

The County Executive sent a memorandum to the Council on July 15, 2015 commenting on the June 29 memorandum from the County Ethics Commission. See ©114-118. The Executive summarized his position on these 6 issues:

In sum, the Council Staff Draft 6 Amendments delete changes proposed by the Commission that are unworkable, impractical, and would establish such nebulous standards as to set traps for the unwary. The Council Staff Draft 6 Amendments accomplish the prime objective of Bill 39-14, to meet the new standards set by the state. They will also guard against improper influence and ensure that public officials and employees exercise impartial, independent judgment when conducting public business.

We will present the Executive's position on each of these 6 issues as they are discussed below.

Issues for Council Decision

Conflicts of Interest

1) Mutual fund exclusion. The current Ethics Law, as amended in 2010, excludes from the definition of *Interest or economic interest*, which applies to both financial disclosure and conflict of interest provisions, any mutual fund regulated by the Securities and Exchange Commission in which the investor does not control the purchase or sale of individual securities. See ©67, lines 29-42 of the Staff Amendment. This amendment recognized that, as a practical matter, no action by a County official could effectively influence the share price of any widely sold mutual fund, so there was no need to require financial disclosure filers to list every mutual fund whose shares they held.

Bill 39-14 would instead exclude any mutual fund "that is publicly traded on a national scale" *unless* the fund specializes in a "specific sector or area" that is regulated by the public employee's governmental unit. See ©3, lines 32-35. Council staff does not believe that the proposed amendment would make the law clearer or more effective. First, we are not sure how to measure whether a fund is "publicly traded on a national scale", or why that should be the standard. The current standard – that the fund is registered with and regulated by the SEC – leaves no room for doubt and to our knowledge has not given rise to any interpretive issues. Second, even if a fund specializes in a particular economic sector or geographic area that a public employee regulates, in our view it's highly doubtful that an official or employee of this County could take an action that by itself would be far-reaching enough to affect that sector and influence the fund's share price.

Council staff recommendation: amend the Bill to put back the mutual fund exclusion in the current law as shown on lines 29-42 of the Staff Amendment at ©67.

2) Soliciting gifts. Bill 39-14 would modify the current Ethics Law's provisions regulating the extent to which public officials and employees can solicit or accept gifts from anyone who has an economic interest in County government actions.

(A) *Prohibition.* Most broadly, the Bill would prohibit a "public employee" (which includes, among many others, County elected officials, specifically the County Executive and Councilmembers) from soliciting *any* gift from *anyone*. See ©3, line 38.²

The current law (see ©3-4, lines 38-55) has a narrower set of restrictions, which only prohibit soliciting gifts:

- during official work hours;
- at a County agency;
- from a lobbyist;
- from someone who does business with the employee's agency or is regulated by that agency;
- from employees whom the employee supervises;
- while wearing a County uniform or otherwise identifiable as a public employee;
- for the employee's own benefit (unless the Ethics Commission approves); or
- with the intent of affecting or offering to affect any action by a County agency.

Bill 39-14 would repeal all these qualifications and would, for example, prohibit an elected official or other County employee from fund-raising from anyone for the employee's church or college or the United Way, or possibly (if broadly interpreted) even from trick-or-treating with the employee's children at Halloween or asking a co-worker to cook dinner for a sick colleague. In our view, this stringent a provision is overbroad and unnecessarily restrictive.

This extremely expansive approach is consistent with both State law³, at least on its surface, and the State Ethics Commission's position that, as described by County Ethics Commission staff (see ©39), the County law should:

follow the State's lead by imposing broad restrictions that could be modified or narrowed in application through interpretation (rather than through exceptions in the law)...The State recommendation is for Montgomery County to include this broad prohibition in the law, without any exceptions, and through (County Ethics Commission) interpretation of the prohibition, create what caveats make practical sense. County (staff) were concerned that generic provisions would not provide suitable notice of what conduct is being prohibited. Notice of what constitutes a

²The Bill would also prohibit a public employee from soliciting a gift from a lobbyist on behalf of another person (see ©5, lines 90-92). Given the general prohibition on line 38, Council staff is unsure why this specific provision is needed. This provision is also essentially copied from the State law.

³The State Ethics Law contains an essentially identical, equally broad provision. See Maryland Code, General Provisions (GP) Article, §5-505(a)(1).

violation is particularly important where violations are sanctioned by civil and criminal penalties.

Council staff sees at least two major policy reasons why this broad-brush approach is inadvisable for the County Ethics Law. First, as both the County Ethics Commission staff and the County Attorney pointed out, this kind of sweeping provision gives little notice of what would or would not violate the law. When civil and criminal penalties are involved, due process essentially requires fair notice to the affected population of what conduct will violate the law. Since (for example) we doubt that any legislative body will consciously intend to criminalize all charitable fund-raising by public employees, a law which does so on its face would not provide effective notice. Particularly in this County, the Council has tried to make County laws accessible and intelligible to the average, not legally trained person by using plain language drafting principles. The State Commission's advice would take the County in a diametrically opposite direction.

Second, the State Commission's approach would effectively transfer legislative authority to the County Ethics Commission, which, while appointed by the County Executive, is not directly answerable to the voters. Under this approach, the County Ethics Commission would define which exceptions to a sweeping general prohibition "make practical sense". With all due respect, in our view that is the County Council's job. Under the current law⁴, the County Commission can adopt regulations "to implement this Chapter", but they must be consistent with the underlying law. A broad delegation of legislative authority to adopt whatever exceptions to the gift prohibition "make practical sense" might not be legally sustainable. And, as a practical matter, a citizen Commission that meets once a month and has only a 3-person staff is not well equipped to take on this level of regulatory burden.

Council staff recommendation: retain the current scope provisions regarding gift solicitation. If the State Ethics Commission has specific objections to any particular provision (which they have not articulated to date), consider their objections individually. See the lines 97-102 and 119-123 of the Staff Amendment at ©69, 70.

(B) *Exceptions* The current law's prohibition also comes with a set of carefully-drafted exceptions that have been in effect for several decades and which the State Ethics Commission has previously approved as complying with the requirements of State law.

The exceptions in the current law to the prohibition on soliciting gifts from certain persons (see ©4-5, lines 56-89) allow a public employee to solicit a gift:

- for a charitable drive (e.g., United Way) at work as part of the employee's official duties;
- for a charity if the employee does not only solicit employees the employee supervises or persons who do business with the employee's agency;
- for a public-private partnership approved by the County Executive or Council President in an order published in the County Register;
- for a nonprofit fire or rescue corporation while wearing its uniform; and

⁴County Code §19A-6(a)(4).

- as an elected official for a charity if the solicitation is disclosed on the official's annual financial disclosure form.

The last provision, relating to elected officials, was inserted in the County law to allow the Executive and Councilmembers to lend their names to charitable events or fund-raising letters, as many worthwhile organizations frequently request. At the public hearing several Councilmembers expressed concern that their ability to do so would be eliminated or severely curtailed if this Bill is enacted as introduced. The County Ethics Commission opposes this exception for elected officials, arguing that it "allows elected officials, and only elected officials, to use the prestige of their office to advance the interests of private charities." See the County Ethics Commission's 6-29-15 memorandum at ©104-105.

At least regarding elected officials, the current County law is not more permissive than the current State law as actually applied. Guidance to State legislators (see ©57-58) from the Joint Committee on Legislative Ethics allows them to solicit charitable contributions, as long as they don't solicit from individual registered lobbyists, but they can solicit contributions from businesses that employ lobbyists. The guidance also makes clear that they can endorse, or lend their names to, fund-raising by charities. And, as far as we can tell, the State guidance does not require legislators to report on whose behalf they have solicited, as the County law does for elected officials.

Council staff recommendation: consistent with the previous recommendation, retain the current set of exceptions. If the State Ethics Commission objects to any particular exception, consider that provision individually. See lines 158-190 of the Staff Amendment at ©71-73.

Alternative Amendment - Use by Elected Officials of the Prestige of Office to Conduct Charitable Fundraising.

Council staff and County Ethics Commission staff worked together to draft an alternative amendment for Council consideration. See the **Charitable Solicitation Amendment** at ©107-108. This amendment would have 3 parts. It would:

- (1) require that the solicitation be addressed to a large group of people in a mass mailing or similar electronic communication that is not targeted to restricted donors or employees supervised by the elected official;
- (2) continue the requirement that the elected official report the solicitation on a financial disclosure form; and
- (3) prohibit the elected official from participating in any decision (such as the award of a grant) in which the charitable organization is a party.

Executive's position: *"The Staff Alternative Amendment is unacceptable because it would preclude an elected official from recommending a charity for a County grant simply because he or she signed a solicitation letter for that charity. I support retaining the present provision, as set out in the Staff Draft 6 Amendment."*

3) Accepting gifts; exceptions. Bill 39-14 would retain, but in some areas significantly modify, the current County law's provisions on acceptance of unsolicited gifts:⁵ Frequently the Bill's primary objective here is to track the State law more closely.

(A) *"Seeks to do business."* Bill 39-14 would prohibit a public employee from accepting a gift, not just from individuals or organizations that do business with the employee's agency, as the current law provides, but also from anyone who "seeks to do business, regardless of amount" with that agency (see ©5, lines 99-100). While this clause does require that the employees knows or should know about the business, as the County Attorney pointed out on ©44-45 "this new language introduced a degree of uncertainty ... that could ensnare a public employee who has no practical means for learning if a business is 'seeking' to do business with the County". **Council staff recommendation:** eliminate the requirement to determine if a donor "seeks to do business" with the County. Council staff recommends inserting a definition of a "restricted donor" that covers the current description of a person that a public employee must not accept a gift from. See lines 44-53 of the Staff Amendment at ©67. This definition of a restricted donor does not include a person who seeks to do business with the County formerly on line 197 of the Staff Amendment at ©73.

(B) *Meals.* The Bill would update and clarify a currently problematic provision. Now an employee can accept a meal from a restricted donor⁶ as long as all meals provided to that employee by that donor do not exceed \$50 in any year. This provision has prevented employees (other than elected officials who are invited as a "courtesy to the office" under another exception, discussed below) from accepting invitations to dinners and like events from organizations such as the Chamber of Commerce where the nominal cost of the event would exceed \$50 (an amount set several decades ago), even if the actual cost of the meal is somewhat less.⁷

Similar to the State law, Bill 39-14 (see ©6, lines 107-111) would effectively waive the \$50 ceiling if at least 20 persons attend the function and retain the \$50 ceiling if fewer than 20 persons attend, in all cases "in the presence of the donor or sponsoring entity". In other words, the law would draw a distinction between large, essentially public, events, and individual or smaller private meals. This amendment would, in all cases, preclude a public employee from accepting a meal, regardless of value, from a restricted donor when the donor is not present (i.e., the legendary practice in Annapolis of a lobbyist leaving his credit card at a restaurant for legislators to use, or the more contemporary offer to an employee of a gift card to use on their own at Starbucks). (Under the County law's financial disclosure provisions, discussed later, meals of \$50 or more would generally be reported.) Although the County Ethics Commission proposed this amendment in the Bill as introduced, they now request that we retain the requirement that an employee's supervisor or

⁵See generally proposed amendments on ©5-7, lines 93-150.

⁶This is a defined term in the Staff Amendment that we propose to use to encompass lobbyists and those who do business with or are regulated by the County or are otherwise specially affected by County actions. See lines 44-53 of the Staff Amendment at ©67. The State Ethics Commission uses a similar term, "controlled donors".

⁷Under a "general guidance" document that the County Ethics Commission issued in November 2012 for events held by restricted donors, the County, acting through the Chief Administrative Officer or Council Administrator, could accept an invitation "on behalf of the County" to certain events (not including holiday parties) where the County would benefit by having staff attend the event; the CAO or Council Administrator would then select particular staff to attend. In Council staff's view this indirect invitation process, while used several times in the last 18 months, has proven cumbersome and not particularly transparent.

manager designate the employee to attend the function. See the County Commission's 6-29-15 memorandum at ©105.

Council staff recommendation: accept this amendment as introduced. See lines 206-211 of the Staff Amendment at ©73.

Alternative Amendment - Meals Amendment.

The alternative meals amendment would require approval of the employee's attendance at the event by the employee's supervisor after finding that the employee's attendance is in the County's interest. If the Council wants to adopt this amendment, it can be accomplished by the **Meals Amendment** at ©109.

This amendment would continue the current practice whereby a restricted donor can provide free tickets to the County and a County official can use the free ticket to send a subordinate public employee to the event.

Executive's position: *"The Commission now opposes its own proposal, preferring that the County follow a cumbersome process where the CAO or Council Administrator reviews each invitation, determines whether the County would benefit by having staff attend the event and, if so, selects particular staff to attend. The Staff Alternative Amendment is unacceptable inasmuch as it also requires this cumbersome review process. I support the Staff Draft 6 Amendment, which reflects the Commission's original proposal."*

(C) *Nominal gifts.* Bill 39-14 would slightly modify the 4 paragraphs that comprise the current law's limits on accepting gifts of nominal value (see ©6,7, lines 112-118, 131-133, and 135-137). Ceremonial gifts would be limited to "insignificant" monetary value (a term not defined in the law), rather than \$100. The gift need not commemorate an event or achievement associated with the employee, as the current law requires. Nominal value gifts could not cost more than \$20, rather than \$10.⁸ Books and other informational or advertising items could only be worth \$20, rather than \$25. Honoraria would be better defined as given for speaking or participating at a meeting, but only if offering the honorarium is not related to the employee's official position.

None of these amendments is substantively earth-shaking; their primary goal is to conform the County law more closely to the State law. These 4 paragraphs could be reorganized and redrafted to better define and distinguish among them, but at the cost of less precisely tracking the State law.

Council staff recommendation: accept these amendments. See lines 212-222 and 233-248 of the Staff Amendment at ©73-74, 74-75.

(D) *"Courtesy to the office" invitations.* Bill 39-14 would make several major changes to the current law's "courtesy to the office" exception, which allows elected officials to accept

⁸The price of coffee mugs and baseball caps has risen markedly in recent years.

invitations from restricted donors to certain types of events. First, it would limit the exception to charitable, cultural, and political events, as the State law does, excluding civic, labor, trade, and sports events. Second, it would limit acceptance to the official him- or herself, where the current County law lets the official bring a guest or, under a 2010 amendment, designate someone to represent the official. Third, although the Bill does not expressly mention this, the State Commission will insist that the invitation must come from the sponsor of the event rather than a third-party, such as a lobbyist or other restricted donor.

If the meals exception is amended as discussed above, this provision becomes relatively less important because many of the events currently covered (other than sports events) are meal-centered. Also, many civic, labor, or trade events in our view could qualify as charitable or political events, depending on which organization sponsors them.

Nonetheless, in our view this provision as currently written is well tailored to the legitimate expectations placed on local elected officials by their constituents – namely, to personally attend their organization’s events, often more than one event simultaneously, or at least to send an appropriate representative. Organizational leaders tend to be offended when their complimentary invitations are dismissed and they are told their local officials either must pay for the event or cannot attend, and the number of scheduled events places a burden on officials whose salaries are not set to meet that level of expense.

Council staff recommendation: modify this amendment to retain civic, labor, and trade events, but exclude sports events; require each event to have at least 20 participants; and require the invitation to come from the event sponsor rather than a third party. Continue to allow an elected official to assign a designee to attend an event. See lines 223-232 of the Staff Amendment at ©74.

(E) *Perishable gifts (the “fruit basket exception”).* The current County law was amended in 2010 (see ©7, lines 143-150) to allow an employee who receives a gift that the employee cannot legally accept, which the employee otherwise must either return to the donor or transfer to the County, to, if the gift is a perishable item, transfer it to a charitable or educational organization “that can make timely and effective use of the gift”.

In Council staff’s view, this creative provision was a practical solution to a recurring office problem: the receipt of unsolicited fruit baskets and various other perishable items, especially during busy holiday periods, that cannot be timely used by a County agency and should not go to waste, but would be impractical (and sometimes insulting) to return to the donor. It was based on the actual practice in many Council offices of taking such items to the nearest day care, homeless, or senior center.

Since this provision took effect in April 2010, we have not heard of any issue arising under it or any substantive reason to repeal it, other than that it is not expressly contained in the State law. Repealing it would not offer any solution to the problem it attempts to solve.

Council staff recommendation: retain this provision. See lines 252-257 of the Staff Amendment at ©75.

4) Misuse of prestige of office.

Section 19A-14 currently prohibits a public employer from intentionally using the prestige of office for private gain or the gain of another. This provision was referred to in the discussion of soliciting gifts. The County has, along with other local jurisdictions, permitted police officers to work outside employment while off duty in their uniforms. The Police Department has developed guidelines for what is permitted. This long-time practice could be considered a violation of Section 19A-14. There are significant policy reasons for permitting this practice. It extends the active police presence in the County since officers are required to respond to incidents they witness at all times while in the County. We recommend an amendment that would permit the County Ethics Commission to adopt a regulation authorizing this limited practice to avoid a conflict with the Ethics Law. The County Commission did not expressly mention this in their 6-29-15 memorandum, but has previously requested an amendment to remove the County Commission from the requirement that police officer outside employment be approved by the Commission. There is no equivalent exception in the State Ethics Law. However, since this practice does not apply to an elected official, it must only be similar to State law rather than equivalent.

Council staff recommendation: amend the law to permit the County Ethics Commission to adopt a regulation that would permit this practice. See lines 90-91 of the Staff Amendment at ©69.

Financial Disclosure

5) Confidential Statements.

County Code §19A-17(a) requires the County Executive, the Chief Administrative Officer, Deputy Chief Administrative Officer, special assistants to the County Executive, the director and deputy director of each department, principal office, and office in County government, and members of the Ethics Commission to file a public financial disclosure statement. Code §19A-17(b) expressly requires Assistant Chief Administrative Officers, attorneys in the Office of the County Attorney, Hearing Examiners, members of the Fire and Rescue Commission, and paid members of any board, commission, committee, or authority of County government to file a confidential financial disclosure statement.

Code §19A-17 also authorizes the County Executive to designate, by regulation issued under method 2, other public employees in the Executive Branch, the Revenue Authority, Board of License Commissioners, or Housing Opportunities Commission to file a public, limited public, or confidential financial disclosure statement. When making this designation, §19A-17(c) requires the Executive to consider if an employee has substantial responsibility for:

1. contracting or procurement;
2. administering grants or subsidies;
3. land use, planning and zoning;
4. regulating, licensing or inspecting any business;
5. other decisions with significant economic impact;
6. law enforcement; and
7. controlling access to confidential information.

Code §19A-17 also authorizes the Council to designate additional employees in the Legislative Branch.

A public financial disclosure statement must include comprehensive information regarding real property interests, business interests, sources of income, gifts, offices, debts, and liabilities (Code §19A-19). A limited public financial disclosure statement must include information about any economic interest or gift that “may create a conflict between the employee or member’s personal interest and official duties” (Code §19A-17(a) (6)). The County Ethics Commission must make public financial disclosure statements and limited public financial disclosure statements available to the public for examination.

A confidential financial disclosure statement must include the same comprehensive information regarding real property interests, business interests, sources of income, gifts, offices, debts, and liabilities as is required for a public financial disclosure statement (Code §19A-19). However, the County Ethics Commission is prohibited from making confidential financial disclosure statements available to the public for examination (Code §19A-18(e) (4)).

The State Ethics Law does not provide for a limited public statement or a confidential statement. In order to conform to the State law, the County Ethics Law should be amended to make all financial disclosure statements public.

Council staff recommendation: amend the law to require everyone to file a public statement and delegate the authority to designate employees not listed in the law to the Chief Administrative Officer for the Executive Branch and Council Administrator for the Legislative Branch. See lines 258-382 of the Staff Amendment at ©75-80.

6) Substantive review of statements.

Code §19A-18(e) requires the CAO or designee to review each financial disclosure statement filed by an employee to see if:

- (i) the answers are complete;
- (ii) there is any conflict of interest with the person's official duties; and
- (iii) there is any potential conflict of interest.

There is no equivalent requirement in the State Ethics Law. As the County Attorney pointed out, it is almost impossible for the reviewer to determine if there is a conflict or a potential conflict by just looking at the filed statement. This provision may have been inserted in the County law to make sure someone reviewed a confidential statement. If the Council accepts our recommendation to eliminate the confidential statement, we do not believe this substantive review is necessary or advisable. The County Ethics Commission continues to believe that this review by a supervisor is important. See County Ethics Commission 6-29-15 memorandum at ©105.

Council staff recommendation: limit the review to determine if the statement is complete. See lines 553-555 of the Staff Amendment at ©86.

Alternative Amendment – Review Amendment

If the Council decides to retain some substantive review of statements, Council staff and County Ethics Commission staff prepared an alternative amendment that would go back to current law. See the **Review Amendment** at ©110.

Executive’s position: *“The Staff Alternative Amendment does more closely mirror the present ethics law. But, if the Council adopts the recommendation to make all financial disclosure statements public, then there is no basis to insist on department head review and certification of each individual statement. Again, I support the Staff Draft 6 Amendment.”*

7) Value of assets.

Md. Code General Provisions Art. §5-607 requires a filer to list the amount of consideration paid or received for real estate or other property owned or sold. Except for the value of gifts received, Code §19A-19 permits a filer to report the value of an interest in property by categories listed in the law. The staff of the State Ethics Commission interprets our statutory categories for valuing property interests as not equivalent to the State law. Requiring an accurate statement of consideration paid or received for each interest in property is burdensome and a wealth indicator rather than a disclosure of potential conflicts of interest. How much a filer paid or received for an interest in property does not change whether or not the transaction creates a conflict of interest. Permitting the County Ethics Commission to adopt a regulation permitting the listing of a value of an interest by category is reasonable. At most, the actual consideration paid should only apply to a statement filed by an elected official, since State law only requires the financial disclosure law for all other County employees to be similar rather than equivalent.

Council staff recommendation: add authority for the County Ethics Commission to adopt a regulation permitting the amount of consideration paid or received to be satisfied by listing a category. See lines 852-856 of the Staff Amendment at ©97.

8) Source of income for fees.

Both State law and current County law require a financial disclosure statement to include all earned income from employment of the filer or an immediate family member and any ownership of a business. The Bill, as introduced, would add a requirement to list the source of each fee received by the filer for services performed. For example, a filer with a home design consulting business would not only have to list ownership of the business, but also the name of each client who paid the filer for services during the reporting year. The County Ethics Commission generated this idea from a Federal regulation (5 CFR §2634.308) that requires a Federal filer to report each source of compensation that exceeds \$5000, but dropped the exclusion for fees below \$5000. While this may provide some information about conflicts, it is burdensome and difficult for a filer to comply with.

Council staff recommendation: delete this new requirement. See lines 914-920 of the Staff Amendment at ©99-100.

Alternative Amendment

Council staff and County Ethics Commission staff prepared an alternative amendment that would limit this requirement to fees received greater than \$5000. See the **Source of Fees Amendment** at ©111.

Executive's position: *"I can support the Staff Alternative Amendment with the modifications shown below (highlighted in grey). Using the example above, these amendments would make clear that the filer who also works as a realtor would only have to identify each individual client who paid him (whether directly or through the realty firm) more than \$5,000 for services he personally provided to that client. The exception in subsection (i) would be deleted as unnecessary."*

- ~~[(7)]~~ (8) Sources of earned income.
- (A) The statement must list the name and address of each employer of the filer, other than the County Government, or a member of the filer's immediate family, and each business entity of which the filer or a member of the filer's immediate family was a sole or partial owner and from which the filer or member of the filer's immediate family received earned income at any time during the reporting period. The statement must include each ~~[[the]]~~ source of ~~[[each fee]]~~ compensation greater than \$5000 for services provided directly by the filer during the reporting period. However, a filer need not include any information:
- (i) ~~[[with respect to any person for whom services were provided by any firm or association of which the filer was a member, partner, or employee unless the filer was directly involved in providing those services; or~~
- ~~[[i]]~~ which is considered confidential as a result of a privileged relationship, established by law, between the reporting employee and any person.

"I support the Staff Draft 6 Amendment. I can also support the Staff Alternative Amendment with the modifications shown above."

9) Self-certification.

The Bill, as introduced, includes a revised §19A-20 which would require a certification by a filer that neither the filer, nor the filer's relatives, have any interest that may create a conflict of interest. The Bill would further require the filer to amend the statement within 5 days after an event occurring during the year that may create a conflict that was not already reported. The County Attorney argues that this provision is difficult to comply with, especially as to whether an economic interest *may* create a conflict. The 5-day time period to amend a statement is also burdensome. See the County Attorney Bill Review Memorandum at ©50-51. The County Ethics Commission

supports this provision. See the County Ethics Commission 6-29-15 memorandum at ©106. **There is no equivalent provision in State law.**

Council staff recommendation: delete the self-certification requirement as long as all statements would be public. See lines 993-1012 of the Staff Amendment at ©102-103.

Council staff and County Ethics Commission staff prepared an alternative amendment that would eliminate the requirement to report on interests owned by relatives who are not in the filer's immediate family and eliminates the requirement to report any change within 5 days. See the **Certification Amendment** at ©112.

If the Council wants to add the certification requirement proposed by the County Ethics Commission, we recommend using the **Certification Amendment**.

Executive's position: *"Again, I support the Staff Draft 6 Amendment removing this provision. Although the Staff Alternative Amendment removes the 5 day reporting requirement, it is unacceptable because it still requires a filer to certify that neither the filer nor the filer's immediate family has any interest that "may create" a conflict of interest."*

10) Immediate Family Amendment.

The Bill, as introduced, would require a filer to disclose an interest in a business or property of the filer's immediate family or other relative only if the filer controlled the interest either directly or indirectly. Although this was proposed by the County Ethics Commission, they changed their position in the June 29 memorandum and now request an amendment that would require disclosure of all interests owned by a filer's immediate family and only an interest owned by another relative if the filer controlled the interest. **Council staff supports this request** and recommends adoption of the **Immediate Family Amendment** at ©113.

Executive's position: *I support the Staff Draft 6 Amendment removing this provision. I also support the Staff Alternative Amendment because I believe it achieves the same result.*

11) Contents of statement for each type of filer.

The Bill, as introduced, and the Staff Amendment each create 3 types of financial disclosure forms. A person filing under §19A-17(a) (elected officials) must report all content required. A person filing under §19A-17(b) (people occupying appointed positions named in the law) must report all content required without the actual value of consideration paid or received for property interests. Finally, a member of the MLS, a board member, or a person designated by the CAO or the Council Administrator under §19A-17(c) must only report compensation or property interests in an entity doing business with the agency the employee works for. The final group creates an obligation to report less than all outside compensation or property owned, but requires the filer to determine whether the compensation or property interest is from or with an entity doing business with the filer's agency. This may be more difficult and create more issues for the filer than simply listing all compensation and property. Rather than require this 3d group to make these difficult

determinations, it would be easier to simply list all compensation and property interests required for the 2d group. It would also avoid having to create 3 separate forms.

Council staff recommendation: make the content requirements for the 3d group the same as the 2d group by:

Amend lines 957-970 of the Staff Amendment as follows:

- (c) Each statement filed under ~~[[Section]] Sections 19A-17(b) and 19A-17(c)~~ must disclose all information required to be disclosed under subsection (a). However, the filer need not specify the nature or amount of consideration given in exchange for an interest or the fair market value of an interest. For a debt, the filer need only disclose the information required under subsection (a) ~~[[5]] (6)(A).~~
- ~~[[d]]~~ Each statement filed under Section 19A-17(c) must disclose, to the best of the filer's knowledge, the information required in subsection (a) ~~[[3]](4)~~ with respect to gifts and must disclose the information otherwise required in subsection (a) only with respect to any interest, compensated position, or liability ~~[[that may create a conflict under Section 19A-11 or is prohibited under Section 19A-12]]~~ with an entity doing business with the County agency with which the employee is affiliated.]

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Fiscal Impact Statement
Bill 42-20, Ethics – Public Accountability and Transparency – Amendments

1. Legislative Summary:

The County Council introduced Bill 42-20 on September 29, 2020, which primarily seeks to enhance public accountability and transparency of non-merit (i.e. appointed) employees in the County by requiring them to disclose outside financial relationships. Bill 42-20 is designed to strengthen the County's Ethics Law, focusing on avoiding conflicts of interest and sustaining public trust. If implemented, Bill 42-20 would make the following modifications to the County law:

- A. It requires the County Executive to disclose a proposed employment contract with an appointee to a non-merit position and any employment contract with an employee currently serving in a non-merit position to the Council as described under Section 1A-102(a)(6) of the legislation;
- B. includes the sale or promotion of certain intellectual property by a public employee as other employment as described under Section 1A-102(g) of the legislation;
- C. prohibits a public employee who has received compensation from an individual or organization in the previous 12 months from participating in a procurement with that individual or organization;
- D. requires a public employee who participates in a procurement process with an individual or organization seeking to do business with the County that compensated the public employee for services performed more than 12 months before the participation began to disclose the prior relationship to the Procurement Director;
- E. requires an elected official or non-merit employee to disclose, with some exceptions, the source of each fee greater than \$1,000 received for services in a financial disclosure statement;
- F. prohibits the Chief Administrative Officer from engaging in other employment as described under Section 19A-12(b)(f) of the legislation; and
- G. generally, amends the laws governing public accountability and trust.

2. An estimate of changes in County revenues and expenditures regardless of whether the revenues or expenditures are assumed in the recommended or approved budget. Includes source of information, assumptions, and methodologies used.

The Ethics Commission exercises authorities granted to it under the Public Ethics Law to promote the public's trust of County government and to ensure the impartiality of County

employees, including elected officials, in the execution of their responsibilities. The Ethics Commission reviewed Council Bill 42-20 and determined there will be no fiscal impact on the agency associated with the proposed legislation; therefore, there is no anticipated change to County expenditures or revenues.

3. Revenue and expenditure estimates covering at least the next 6 fiscal years.

See Question #2.

4. An actuarial analysis through the entire amortization period for each bill that would affect retiree pension or group insurance costs.

Not applicable.

5. An estimate of expenditures to County's information technology (IT), including Enterprise Resource Planning (ERP) systems.

Not applicable.

6. Later actions that may affect future revenue and expenditures if the bill authorizes future spending.

Bill 42-20 does not authorize future spending.

7. An estimate of the staff time needed to implement the bill.

The legislation will have an incidental impact on staff time in implementing a minor change to the financial disclosure system. However, the staff time needed to make these minor system changes are immaterial and can be absorbed within the existing personnel complement.

8. An explanation of how the addition of new staff responsibilities would affect other duties.

Not applicable.

9. An estimate of costs when additional appropriation is needed.

Not applicable.

10. A description of any variable that could affect revenue and cost estimates.

Not applicable.

11. If a bill is likely to have no fiscal impact, why that is the case.

See Question #2.

12. Other fiscal impacts or comments.

Not applicable.

13. An explanation of the staff time needed to implement this bill.

Not applicable.

14. Ranges of revenue or expenditures that are uncertain or difficult to project.

Not applicable.

15. The following contributed to and concurred with this analysis:

Robert Cobb, Chief Counsel/Staff Director, Ethics Commission

Phil Weeda, Office of Management and Budget



Jennifer Bryant, Acting Director
Office of Management and Budget

10/16/20

Date