Attachment #4

Transition2017

TO: Transition Board

FROM: Gregory Weber, Partnership staff

DATE: March 9, 2017

SUBJECT: Stipend for Directors

Recommendations:

Adopt the Governance Committee's recommendation that:

1. Partnership staff poll the Transition Board directors to determine which ones would want or need to receive a stipend for service as a director, were one to be offered. Such a stipend would be over and above any reimbursements for travel-related expenses.
2. Based on the responses to the poll, direct staff whether to include such a stipend in the revised budget currently under development.
3. Were the Transition Board to direct staff to include such a stipend in the revised budget, recommend an amount and formula for awarding any such stipend.
4. Ensure that any such amount and formula meets legal requirements.
5. Make clear to Transition Board members and Partnership members that this policy will only be effective for 2017; delegate consideration of future stipends to the ad hoc Bylaws Revision Committee, or its equivalent.

Background:

The Partnership wants to encourage participation on the Board of Directors by members of nonprofit organizations.

As the Council, it encouraged that participation in two ways. First, it reimbursed directors for their actual, reasonable and documented travel expenses while on Council business. Second, it provided a $10,000 annual stipend to the Board Chair. In practice, when the chair was an employee of a water utility, he or she would designate that the stipend be paid to the vice-chair, who would have represented a Group 2 environmental advocacy organization. It did not, however, provide any stipend to directors who were neither board chair or vice-chair.

Offering a stipend to directors representing nonprofit organizations could help encourage their participation on the Partnership board. Members of nonprofits generally have to raise funds to pay for all of their activities. Prior Group 2 officers have said that the stipend was essential to their participation as officers.

The tentative 2017 budget adopted by the Board and members includes funding for both travel reimbursement and an officer stipend. That budget, however, did not assume that the members would adopt the transition package. In adopting the budget, directors specifically recognized that were those changes adopted, staff would need to revise the budget substantially. The process of budget revision is now under way.

To determine whether the governance structure inherited from the Council permits a stipend to directors, staff reviewed the Council bylaws and its policies. It also consulted with outside counsel.

As for Council policies, staff was unable to find a Council policy that addressed a director's stipend other than the stipend to the chair noted above.

As for Council bylaws, Section 7.11 states: "Unless otherwise established by resolution of the Board, Directors shall not be entitled to compensation for their services as such." By extension, the Board, by resolution, could authorize a stipend.

As for applicable laws, outside counsel wrote that:

- The California Corporations Code does not prohibit compensating Directors for providing services as Directors and it is therefore generally permitted unless the organization's Articles or Bylaws prohibit it.
- As staff noted above, Bylaws section 7.11 would permit such stipends upon passage of a Board resolution.
- There's no requirement in the Code that all Directors be compensated equally for serving as Directors, although the organization should of course consider whether offering compensation or reimbursement to some Directors and not others will create any tension or conflict within the organization.
- Most nonprofits choose not to compensate Directors because of the optics, even if legally permissible.

Were the Board to enact a resolution approving a directors' stipend,

- The Board would need to approve such compensation in advance.
- Under state law, the compensation of a Director must be just and reasonable to the organization at the time it is authorized.
- Under federal law applicable to 501(c)(3) organizations, the compensation must be fair and reasonable, and not excessive, to the organization in light of the services the organization is receiving in return and the private benefit provided to the Director(s) must be incidental to furthering the exempt purposes of the organization.
- In addition, if the stipend is considered compensation for services rendered to the corporation, depending upon the amount offered, federal excess benefit transaction rules might be triggered. The Partnership would need to report such compensation on its tax forms. The amount of the compensation could be reviewed for excessiveness; all compensation decisions would need to be well documented. Prior Council reporting to the IRS of the $10,000 annual stipend to the Chair, however, has not triggered any such review. Of course, IRS inaction does not constitute approval.

The recipient of any such stipend would need to consider several matters.

- If it goes to the individual director, it could well be treated as compensation and may therefore constitute taxable income for the recipient. If so, the Council would need to issue an IRS Form 1099 to the director, and the director would need to report it on his or her personal income tax return. Partnership staff has not consulted outside counsel as to whether paying such compensation to the Director's organization would avoid this potential problem.
- In addition, several provisions of California law, as reflected in Bylaws sections 13.08 and 13.09, shield "volunteer" directors from certain kinds of liability associated with their tenure as directors. These protections are not lost when directors receive reimbursement for expenses. They could well be lost, however, if the stipend were to be considered "compensation." Again, Partnership staff has not consulted outside counsel as to whether paying such compensation to the Director's organization would avoid this potential problem.

In summary, were the Transition Board to adopt a resolution authorizing such a stipend, the stipend would be permissible under state and federal law as well as the Partnership's bylaws. The

Transition Board could authorize such a stipend to one, some or all directors. The amount of the stipend would need to be reasonable in light of the services rendered. There could well be potential tax consequences to both the directors involved as well as the Partnership, although, absent an excessive amount of a stipend, the consequences to the Partnership seem less severe.

Partnership staff is currently beginning to revise the 2017 budget in light of the financial package approved by Council members on December 30, 2016. In that budget, staff will recommend continued reimbursement for actual, reasonable and documented expenses of directors. Staff seeks Transition Board direction on the desirability of including a director's stipend and the amount of any such stipend.

At its March 8, 2017, meeting, members of the Governance Committee accepted staff's recommendation to first survey Transition Board members to determine the number, if any, of directors who would either want or need such a stipend.

As to the wisdom of offering any such stipend, committee members expressed a range of views on the desirability of offering such stipends. To those who were favorably inclined to such a stipend, the idea of a flat per-day, or per-half-day stipend, for participation in Partnership meetings, calls, and events, resonated. The Committee as a whole, however, took no action on either the wisdom, amount or formula for determining any such stipend.

The committee did agree to recommend that were the Transition Board to authorize any such stipend, it should make clear to Transition Board directors and Partnership members that this policy will only be effective for 2017. The ad hoc Bylaws Revision Committee that the Governance Committee recommended (see Bylaws Revision item elsewhere on this Transition Board agenda) should consider the appropriateness of any future stipends.