

Chapter 12X of the Administrative Code

Policy Alternatives



CITY & COUNTY OF SAN FRANCISCO

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City Administrator's Office

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Executive Summary

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In October 2022, Supervisors Mandelman, Stefani, Peskin, Ronen, and Safai submitted a letter of inquiry to the City Administrator's Office (CAO), asking the CAO to draft a memo on Chapter 12X of the Administrative Code, including:

- a review of the efficacy of current 12X legislation;
- the impact of 12X legislation on City operations;
- an analysis of whether other jurisdictions have enacted similar policies that could serve as best practices; and
- a range of policy alternatives for the Board's consideration.

In response to this inquiry, this report finds that:

- **12X's policy impacts are not clear**; the CAO was not able to find concrete evidence suggesting 12X has influenced other states' economies or LGBTQ, reproductive, or voting rights.
- **12X has created additional administrative burden for City staff and vendors and unintended consequences for San Francisco citizens**, such as limiting enrichment and developmental opportunities.
- **Few, if any, other jurisdictions implement travel or contracting bans as expansive as the City's.**
- Potential alternatives to 12X range from administrative revisions of the existing legislation to repealing the entirety of 12X.

The purpose of this report is to provide policy options for the Board's consideration. The five policy alternatives are listed on the following slide.

The following are alternatives to the current 12X legislation for the Board of Supervisors' consideration.

Alternative 1: Repeal the Entirety of 12X

This alternative would likely reduce administrative complexities, increase competition for City contracts, thereby possibly lowering costs, and create more opportunities for engagement with communities impacted by restrictive LGBTQ, abortion, and voting right policies.

Alternative 2: Repeal the Contracting Ban, Retain the Travel Ban

This alternative may help reduce the City's contracting costs. SF City staff and residents would still face hurdles in traveling to and accessing many developmental and enrichment opportunities, as many banned states are home to events and sites of cultural significance.

Alternative 3: Exempt Chapter 6 Contracts from 12X

This alternative would potentially increase competition, and thereby possibly lowering costs, for construction and construction-related services. It may also increase the cost of administration due to confusion in contracting business processes and additional system configurations that would be need to be implemented. It does not solve all underlying challenges related to 12X.

Alternative 4: Conduct an Administrative Clean-up of 12X

This alternative could make the 12X ordinance easier to administer. It does not solve all underlying challenges related to 12X.

Alternative 5: Create "Off-ramps" for 12X

This alternative would allow the City to contract with businesses in banned states if they achieve individual, firm-level compliance. This alternative is likely to create the highest level of administrative cost and burden because of the new requirements that would need to be developed to implement it. It would more likely benefit large firms.

- **The current 12X legislation contains three articles:** Article I was passed in 2016 to dissociate the City from states that restrict LGBTQ rights. Articles II and III were added in 2019 and 2021, respectively, to dissociate the City from states that restrict abortion access and voting rights.
- More specifically, **12X has two separately administered components:** It bans nearly all City-funded travel to states with restrictive rights, identified through a list that the City Administrator compiles and updates semiannually; and it bans construction (Chapter 6), commodity and services (Chapter 21) contracting with companies headquartered in those states. Under limited circumstances, City staff can seek waivers for contracting, but they must provide proper justification and receive approval from their departmental leadership. (See Appendix 2 for a brief explanation of 12X exemptions, waivers, and applicability).

A map of the United States with states colored red or light gray. Red states include: WA, OR, ID, MT, ND, SD, MN, WI, MI, IL, IN, OH, PA, WV, VA, NC, SC, GA, FL, TX, OK, AR, LA, MS, AL, and TN. Light gray states include: CA, NV, UT, AZ, NM, CO, WY, NE, IA, MO, KY, DE, NJ, NY, CT, MA, RI, ME, VT, NH, and HI. A legend in the bottom right corner indicates that red states are 'Subject to 12X Travel and Contracting Ban' and light gray states are 'Not subject to 12X Travel and Contracting Ban'.

Efficacy of 12X

On a policy level, it is unclear how much the City's prohibition on City-funded travel and boycott of businesses headquartered in banned states can influence another jurisdiction's policies.

- **No states with restrictive LGBTQ rights, voting rights, or abortion policies have cited the City's travel and contract bans as motivation for reforming their laws.**
- Since 12X became operative, the number of banned states has grown from 8 states in 2017 to 30 in 2022. This increase suggests that the City's threat of boycott may not serve as a compelling deterrent to states considering restrictive policies. Only 1 state has ever been removed from the list.
- Few, if any, other cities or states are known to implement boycotts as far reaching as the City's, and many that have instituted travel or contracting bans in the past have since lifted them (see Appendix 2: Other Jurisdictions' Policies for examples).

Impact on City Operations

The policy impact of 12X is unclear. Conversely, **12X is associated with high levels of administrative burden and likely imposes significant opportunity costs to the City.**

- Because **traveling to or contracting with companies located in banned states is at times necessary to maintain City operations and/or further the City's mission**, City spending continues to flow to businesses and institutions headquartered in banned states, but City staff and suppliers must complete additional administrative requirements.
- **There are unintended consequences to 12X.** For example, a department might distribute City-funded grants to nonprofit organizations. As part of the program, the nonprofit runs a sports program for children and the children must travel to tournaments, some of which are in banned states. This travel may be banned or require additional administrative steps due to 12X restrictions.
- While it is difficult to quantify the exact cost of 12X to the City, the Budget and Legislative Analyst notes that **a loss in competition is likely to increase the City's contracting costs by 10 – 20% annually.** These costs could continue to increase and compound overtime as the City's potential contractor pool shrinks if the list of banned states grows.
- **On an administrative level, 12X compliance is complicated and confusing.** There are different rules governing the travel ban and the contracting ban, making it very complicated for staff to administer. The Administrative Code allows departments the flexibility to develop their own protocols for administering 12X, which can lead to a high level of variation in how individual departments interpret and document waiver justifications, monitor implementation, and conduct reporting. Finally, due to the nature of corporate structures, determining where a business is headquartered is complex and can require legal analysis.
- **There is a cost associated with administering 12X.** The Budget and Legislative Analyst's report confirms that there are one-time implementation and on-going administrative costs associated with 12X.

Alternative 1: Repeal the Entirety of 12X

What Would This Look Like?

- Under this approach, City departments can work with suppliers headquartered in banned states without needing a 12X waiver, as long as the supplier meets the City's other supplier requirements, such as local hire, nondiscrimination requirements, prevailing wage, and local business requirements, depending on the type of procurement.
- City staff can travel to banned states to conduct City business where this travel was previously not allowed.
- The Board of Supervisors would need to pass legislation fully repealing Administrative Code Section 12X.

Considerations

- 12X has increased administrative complexity for City staff while reducing competition and increasing the price for the goods and services that the City purchases. Repealing the entire law would **remove complexity, allow for greater competition, and potentially reduce prices.**
- Without the contracting ban, the City opens itself up to new possibilities in resource savings and value generation when procuring goods and services.
- An increase in bidders may result in greater competition for businesses located in non-banned states, including local businesses.
- Without the travel ban, the City opens up **new developmental and enrichment possibilities for staff and San Francisco residents.**

What Would This Look Like?

- Under this approach, City departments can work with suppliers headquartered in banned states without needing a 12X waiver, as long as the supplier meets the City's other supplier requirements.
- Staff would not be allowed to travel to a banned state on City business unless explicitly exempted under 12X.
- This approach would mean that the Board of Supervisors passes legislation repealing Administrative Code Sections 12X.5, 12X.15, and 12X.26 related to the Contracting Ban. Other sections of 12X would remain in place.
- This approach was included in the Budget and Legislative Analyst's report on 12X.

Considerations

- Repealing the contracting ban would allow the City to broaden its pool of potential contractors, which would **likely increase competition, lower costs, and bring and resource savings to the City.**
- Repealing the contracting ban and aligning the City's travel ban to the State of California's travel ban would **create a more cohesive policy environment for City staff.** Instead of navigating multiple policy frameworks that can at times conflict, staff would only have to understand one, overarching travel policy framework. California's AB 1887* prohibits state-sponsored travel to certain states, but it does not include a contracting ban.
- Currently, the list of banned states with restrictive LGBTQ policies differs slightly between the State and the City. As part of this approach, the City could adopt the State's list, which would simplify the policymaking process moving forward.
- The travel ban can extend to contractors conducting work on behalf of the City, so City staff must continue to interpret and navigate some administrative complexities for travel.
- **The State's travel ban has also been critiqued.** Editorials and opinion pieces in the [LA Times](#) and [New York Times](#) have both pointed out that the State's policy has led to more bureaucracy and administrative workarounds.
- **Many of the banned states are also home to sites of historical or cultural significance to the populations that 12X is supposed to defend.** This can lead to instances where SF residents face increased barriers to accessing enrichment opportunities. For example, a program supporting youth travel to Historically Black Colleges and Universities (HBCUs) had to complete several additional administrative requirements before the travel could be approved because many HBCUs are located in banned states.

*AB 1887 only pertains to states with restrictive LGBTQ policies; it does not include abortion or voting rights.

Alternative 3: Exempt Chapter 6 Contracts from 12X

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What Would This Look Like?

- This approach would exempt Chapter 6 contracts for construction and construction professional services from 12X. Chapter 6 departments could work with suppliers headquartered in banned states without needing a 12X waiver, as long as the supplier meets the City's other supplier requirements.
- Chapter 21 commodities and services contracts would remain subject to 12X.
- Ordinance 221147 has already been introduced to exempt Chapter 6 contracts (construction & related services) from 12X.
- This legislation would need to be passed by the Board of Supervisors.

Considerations

- Exempting Chapter 6 contracts from 12X would increase competition and potentially reduce prices for Chapter 6 contracts.
- Removing Chapter 6 contracts from 12X would reduce some of the administrative complexities when procuring goods and services critical to our infrastructure and maintenance projects.
- **This will not remove the administrative complexity or allow for greater competition – and potentially reduce prices – for the City's commodity or service contracts.** In the last 5 years, the City spent approximately \$12B on Chapter 21 commodities and services. Key commodities that the City purchases – such as medical supplies, crime lab equipment, and water treatment chemicals – will still be subject to 12X.
- Exempting Chapter 6 contracts while continuing to subject Chapter 21 contracts to 12X creates a different set of administrative rules and system configurations that are based on the type of procurement (construction, services or commodities) a department is conducting. **This can lead to additional administrative costs and confusion over time.**

What Would This Look Like?

- This approach will keep the policy framework of 12X in place but amend Administrative Code Section 12X to make 12X simpler to administer.
- This could include merging the three Articles that cover the different aspects of the law into one to ensure consistent terminology and applicability, aligning and/or clarifying the operative dates between the different Articles, and updating the applicability of the contracting and travel bans so they match.
- Legislation implementing administrative amendments to 12X would need to be passed by the Board of Supervisors.

Considerations

- Currently, the 12X ordinance is written in a way that makes it difficult to administer. For example, different articles have different operative dates, and the travel and contract bans require different analyses to determine applicability and waiver eligibility.
- Re-writing the ordinance so that operative dates, terminology, travel and contract exemption requirements, and other administrative aspects align would improve 12X oversight.
- Administrative clean-up alone is **will not increase competition or reduce administrative burdens.**
- Though an administrative clean-up could make the procurement and contracting process easier for City staff to conduct, it **would not reduce the burden of compliance for suppliers or increase competition for City procurement.**

Alternative 5: Create “Off-ramps” for 12X

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What Would This Look Like?

- An off-ramp is a mechanism by which a supplier in a banned state could still do business with the City by demonstrating that their organization aligns with and represents the City’s stated values.
- This approach would implement ways that suppliers could demonstrate their alignment with City values and therefore be allowed to enter into contracts with City departments without obtaining a 12X waiver.
- Legislation allowing for these off-ramps and providing funding for staff to oversee this work would need to be passed by the Board of Supervisors.

Considerations

- Creating off-ramps would allow the City to do business with compliant suppliers in banned states, which could possibly increase competition. However, suppliers in banned states may not fully understand the nuance of the City’s off-ramps and chose not to bid.
- Off-ramps would not apply to the travel ban (i.e. the travel ban would remain in place.)
- **3 different sets of offramps that the City can clearly define and verify would need to be created** for each of 12X’s articles. Given that many states are banned by multiple articles, a business may need to comply with up to 3 different sets of criteria before it would be considered 12X compliant.
- This will **likely lead to a higher level of administrative burden and costs than currently exists**. Specifically, the City would need to develop and administer entirely new processes for ensuring compliance with the new supplier compliance requirements.
- Off-ramps are **more likely to benefit bigger, more-resourced businesses**. The burden and cost of meeting 3 separate off-ramp criteria would likely overwhelm small businesses.
- **This would likely slow down the process of executing a contractual agreement** if a supplier is not compliant at the time of award.

Appendix 1: Currently Banned States List

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Restrictive LGBTQ Laws	Restrictive Abortion Laws	Restrictive Voting Laws
<ol style="list-style-type: none">AlabamaArizonaFloridaGeorgiaIdahoIndianaIowaKansasKentuckyLouisianaMississippiMontanaNorth CarolinaNorth DakotaOhioOklahomaSouth CarolinaSouth DakotaTennesseeTexasWest Virginia	<ol style="list-style-type: none">AlabamaArizonaArkansasFloridaGeorgiaIdahoIndianaIowaKansasKentuckyLouisianaMississippiMissouriMontanaNebraskaNevadaNew HampshireNorth CarolinaNorth DakotaOhioOklahomaPennsylvaniaSouth CarolinaSouth DakotaTennesseeTexasUtahWest VirginiaWisconsinWyoming	<ol style="list-style-type: none">AlabamaArizonaArkansasFloridaGeorgiaIdahoIndianaIowaKansasKentuckyLouisianaMontanaNevadaNew HampshireOklahomaTexasWyoming

Current as of September 15, 2022. Note: The State of California's list currently restricts travel to 23 states and only pertains to states with restrictive LGBTQ laws.

Appendix 2: 12X applicability vs. exemptions vs. waivers

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Note: **The travel ban and the contracting ban require two separate analyses** (i.e., in cases where the travel ban is exempt, the contracting ban may still apply. In cases where the contracting ban is exempt or waived, the travel ban may still apply.)

	Travel Ban	Contracting Ban
Applicability	The 12X Travel Ban applies to <u>any</u> expense paid by City funds with respect to travel to a 12X State by City employees, contractors or grantees, unless the travel purpose falls into one of 7 exemption categories.	The 12X Contracting Ban applies solely to Contracts, Purchase Orders and Direct Vouchers that fall under Administrative Code Chapter 6 or Chapter 21.
Exemptions	<p>City-funded travel to a banned state is exempt if it falls into one of the seven categories below:</p> <ol style="list-style-type: none"> 1. Travel is necessary for the enforcement of any state or City law; 2. Travel is necessary for the defense of any legal claim against the City; 3. Travel is required by law. 4. Travel is required to meet contractual obligations incurred by the City. 5. Travel is necessary for the protection of public health, welfare, or safety. 6. Where the funding source of the Employee, Contractor or Grantee travel prohibits City from applying the 12X Travel Ban (e.g., Federal Funds). 7. Employee, Contractor or Grantee travel that requires landing in or going through a 12X State to complete the travel. 	<ul style="list-style-type: none"> • Chapter 21G Agreements • Chapter 23 Agreements • Employee Expenses and Reimbursements • Contracts for the Investment of Trust Money • Contracts for Underwriting Services • Contracts Advertised, Solicited or Initiated prior to the Applicable Article's Operative Date
Waiver Eligibility (documentation required)	The travel ban <u>cannot be waived</u> . Travel to a banned state may only occur if it is considered exempt.	<p>If a contract is not exempt, it can still be waived under the following circumstances:</p> <ul style="list-style-type: none"> • Sole Source • Declared Emergency • Only One Responsive Contractor • Adverse Impact/Substantial Interest • Bulk Purchasing (i.e., Piggybacking) • Conflicting Grant Terms • SFPUC Bulk Water, Power and Gas

Appendix 3: Other Jurisdictions' Policies

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What other jurisdictions have tried travel or business boycotts?

It is difficult to quantify the number of jurisdictions that have enacted travel and/or contracting bans, as this would require a detailed analysis of governing codes and executive orders for 50 states and over 300 municipalities.¹ However, a recent Wall Street Journal article² noted, "Other Democratic-controlled state and local governments including New York City and state, Seattle, Salt Lake City, Los Angeles County and California have implemented similar bans on publicly funded travel, though San Francisco remains the most expansive" (Oct 2022).

Below are examples of jurisdictions that have restricted activities with other states at some point in time and why those restrictions were put in place. Note: These examples are not comprehensive and are for illustrative purposes only.

Jurisdiction	Example
City of Seattle	Executive Orders in 2016 restriction travel to Indiana, Mississippi, North Carolina over LGBTQ rights; travel restriction to Indiana lifted within a year. Status of restrictions on Mississippi and North Carolina unclear.
State of New York	Executive Order in 2016 restriction travel to North Carolina over LGBTQ rights. Current status unclear.
City of Los Angeles	Ordinance in 2010 restricting travel and contracting with the state of Arizona over immigration policies. Restrictions dropped in 2018. (See legislative analysis.)

¹If the analysis were limited to cities with population size >100,000.

²Mai-Duc, Christine (2022). "San Francisco Reconsiders Business Ban that Targets States' Social Values." *Wall Street Journal*. Retrieved at: <https://www.wsj.com/articles/san-francisco-reconsiders-business-ban-that-targets-states-social-values-11666789223>

