September 12, 2012

Honorable Katherine Feinstein
Presiding Judge of the Superior Court
400 McAllister Street, Room
San Francisco, CA 94102-4512

RE: San Francisco Civil Grand Jury Report Surcharges and Healthy San Francisco: Healthy for Whom?

Presiding Judge Feinstein.:

I am writing in response to a letter dated July 16, 2012 from Mario Choi of the 2011 – 2012 San Francisco Civil Grand Jury demanding responses from the Golden Gate Restaurant Association (GGRA) regarding the Grand Jury's report entitled *San Francisco Civil Grand Jury Report Surcharges and Healthy San Francisco: Healthy for Whom*.

The authorizing statute for the Civil Grand Jury states that "[t]he grand jury shall investigate and report **on the operations, accounts, and records of the officers, departments, or functions of the county.**" CA Penal Code Section 925. The section does not authorize the Grand Jury to demand responses from private citizens or non-profits that are not affiliated with county government. We believe that the inclusion of the GGRA's name in the report, the demand for responses by the GGRA, as well as the subject matter of private business contracts and practices are all inappropriate and beyond the jurisdiction of the Civil Grand Jury.

However, since the GGRA's name was publically published in the report, even after we raised the issue with Foreperson Pro Tem Mario Choi prior to publication, we felt obliged to invest the time and resources to respond to the reports many misleading and erroneous findings and recommendations.

The GGRA feels very strongly that the Civil Grand Jury should not again be permitted to demand responses or list names of private entities in future reports. It sets a very dangerous precedent for a government investigatory body to go so far afield from its stated purpose and jurisdiction.

Sincerely,

Rob Black
Executive Director
Golden Gate Restaurant Association
cc: San Francisco Civil Grand Jury

GOLDEN GATE RESTAURANT ASSOCIATION

RESPONSES TO FINDINGS AND RECOMMENDATIONS IN SAN FRANCISCO GRAND JURY REPORT ENTITLED "SURCHARGES AND HEALTHY SAN FRANCISCO: HEALTHY FOR WHOM?"

I. CUSTOMER SURCHARGES FOR HEALTH CARE MANDATES

Responses to Findings

F1. The Jury could not identify any government investigation that reports the number of businesses adding surcharges to pay for HCSO employer mandates and mandated paid sick days.

Disagree partially. As of January 2012, San Francisco Administrative Code Section 14.3(d) requires all Covered Employers to inform OLSE on an annual basis if they add a surcharge for the purpose of covering, in whole or in part, the cost of the employer expenditure mandate. This is reported annually in the OLSE "Analysis of the Health Care Security Ordinance." The law requiring disclosure does not address mandated paid sick days.

F2. The City has not investigated health care related surcharges to determine whether or not employers are generating profits from these surcharges.

Disagree. As of January 2012, San Francisco Administrative Code Section 14.3(d) requires all Covered Employers to inform OLSE on an annual basis whether they add a surcharge for the purpose of covering, in whole or in part, the cost of the employer expenditure mandate. The City also requires the reporting of all healthcare expenditures for covered employees. All of this information is reported annually in the OLSE "Analysis of the Health Care Security Ordinance."

F3. Neither the City nor the State of California, to the Jury's knowledge, has investigated whether sales tax is being added to surcharges.

Disagree. In April 2009, the State Board of Equalization issued a special notice to businesses regarding the applicability of sales tax to HCSO surcharges and how the tax should be calculated. Any tax audit by the Franchise Tax Board or the Treasurer's Office would identify businesses that are underreporting their individual sales tax.

F4. NO RESPONSE REQUESTED

F5. San Francisco businesses that collected surcharges prior to January 1, 2012 have no obligation to report surcharge receipts to the City nor reconcile the surcharges with health care expenses.

Disagree. Under San Francisco Administrative Code Section 14.3(d) all Covered Employers must inform OLSE on an annual basis whether they add a surcharge for the purpose of covering, in whole or in part the cost of the employer expenditure mandate. The reporting requirement under this code section applied to 2011. The City also required reporting of all healthcare expenditures for covered employees for 2011.

F6. Due to the varied wording in describing surcharges on consumer's bills, and the wording of the ordinance, the auditing of surcharges will be difficult.

Disagree. San Francisco Administrative Code Section 14.3(d) requires all Covered Employers to inform OLSE on an annual basis whether they add a surcharge for the purpose of covering, in whole or in part the cost of the employer expenditure mandate. The City also requires the reporting of all healthcare expenditures for covered employees. All of this information is reported annually to the OLSE making a review of the data very simple.

F7. Consumer fraud is committed if the consumer's receipt states that a surcharge is being assessed for a stated purpose and is not being used for that purpose.

Disagree partially. As of January 2012, this issue is addressed under San Francisco Administrative Code Section 14.3(d) by requiring that a "Covered Employer must irrevocably pay or designate an amount equal to that difference for health care expenditures for its Covered Employees" and the amount collected in a surcharge for that purpose. The statute also authorizes OLSE to "refer any potential cases of consumer fraud to appropriate authorities."

It is possible that under certain circumstances that this could be considered consumer fraud. However, fraud is a fact based question depending on the individual circumstances involved. Consumer fraud requires intent on the part of the defendant, harm on the part of the plaintiff, as well as several other elements. If information conveyed during a business transaction is done without the intent to deceive for example, there is no consumer fraud.

Responses to Recommendation

R1. Disallow employers subject to the Office of Labor Standards Enforcement regulations from adding surcharges on customer's bill to pay for HCSO employer mandates and mandated paid sick days.

Disagree. This recommendation is not warranted or reasonable. As discussed above, recent amendments to the HSCO which became effective in January 2012 adequately address the issue of consumer fraud. San Francisco Administrative Code Section 14.3(d) addresses the issue by requiring that "the Covered Employer must irrevocably pay or designate an amount equal to that difference for health care expenditures for its Covered Employees" and the amount collected in a surcharge for that purpose. The statute also authorizes OLSE to "refer any potential cases of consumer fraud to appropriate authorities."

In addition, this recommendation is an attempt to ban a very prevalent and long standing business practice used by many industries for many different purposes and is an inappropriate infringement on the ability of businesses to determine the prices charged for goods and services. Under the Grand Jury's recommendation, if Bank of America used a portion of the money collected through their ATM surcharges to offset the cost of San Francisco mandated healthcare expenditures, they would be prohibited from charging the surcharge. As well, if a business charged a "health care" surcharge but

spent more on healthcare than was collected through the surcharge, they would still be prohibited from charging the fee even though all of the money collected was spent on employee healthcare.

R2. NO RESPONSE REQUESTED

R3. NO RESPONSE REQUESTED

II. EMPLOYERS HEALTH REIMBURSEMENT ACCOUNTS

Responses to Findings

F8. Employers with HRAs in 2010 allocated $62 million for medical care, reimbursed employees $12 million, and retained up to the remaining $50 million.

Disagree. The City has no data for 2010 regarding how much of the $50 million was in HRAs, HSAs, FSAs or other reimbursement arrangements. In addition, the City does not know how much of the money that was not utilized by employees remained in the employees possession or account. For example, any money placed in an HSA automatically becomes the sole property of the employee and can never be recaptured by the employer. It is unclear how much of the $50 million was distributed into HSA accounts or into HRA accounts that rolled over. By using 2011 numbers as a guide, this number could be close to 40% or more of the remaining money.

F9. Given similar demographics the 20% reimbursement rate for HRAs is well below the City's 50% reimbursement rate for MRAs due to lack of program notification to employees, stricter HRA guidelines, and employees' unwillingness to disclose their medical conditions to their employer.

Disagree. The Grand Jury has no basis to conclude that participants in the City's MRA plan have similar demographics to individuals whose employers use private HRA accounts to meet the City's expenditure requirement . More importantly, the recent amendments to the HSCO which became effective in January 2012 require employers to post a multi-language notice in the workplace as well as notify workers on a quarterly basis as to the amount of the benefit, what it can be used for, and how they can access the benefit. These amendments will likely result in similar reimbursements for MRAs and HRAs in 2012 and going forward. Regarding the unwillingness to disclose individual medical conditions to their employers, only 15% of all reimbursement plans are self-administered, so the overwhelming majority (85%) of employers use third-party administrators or provide the type of benefit that would never require the employee to provide the employer with private medical information.

F10. Significant numbers of restaurants utilizing HRA's in 2010 paid out no medical expenses.

Disagree. For 2010, OLSE did not collect data by industry so this assertion as it pertains to restaurants is unfounded.

F11. Employees with two or more employers may have two or more HRAs, likely with differing guidelines for what constitutes medical expenses with differing time limits.

Agree.

F12. HRAs may not be an allowable option in meeting the federal requirements under the Affordable Care Act (AFC).

Agree. Whether an HRA will be an allowable means of compliance with the Affordable Care Act (AFC) is unknown at this time. HRAs may or may not be an allowable option in meeting the federal requirements. The City's MRA option will likely have the same challenges under the AFC as a private sector HRA. However, HRAs could also apply to different workers than those covered under the AFC. The AFC applies to the full time employees of employers with 50 or more employees. The HCSO applies to both full and part-time employees of employers of 20 or more. An HRA may still be an allowable way to meet the requirements under the HCSO for part-time employees and for employers with between 20 and 49 employees.

F13. The financial incentive to retain unspent HRA funds could be a motivating force for employers to restrict employee access to these funds.

Disagree partially. Under the previous law this could have been the case. Under the recent amendments which became effective in 2012, this issue is addressed in a variety of ways – including posting and quarterly notice requirements so that employees are aware of their benefits and how to use them, and by requiring all unused monies to remain with the employee for a minimum of 24 months, and for at least 90 days post separation from employment. In addition, the law now requires that any benefit plan must be structured as to be "reasonably calculated to benefit the employee." OLSE now has the authority to determine that an overly restricted reimbursement account is not designed to reasonably benefit the employee and therefore the account would not be considered a qualifying expenditure under the HCSO. Previously, there may have been financial incentives for restricting information and benefits, but the new law that went into effect in January 2012 addresses any potential financial incentives for restricting HRAs.

F14. By submitting personal medical invoices directly to their employers, employees are forced to reveal their medical history and current health conditions to their employees.

Disagree. The Civil Grand Jury makes the incorrect assumption that HRA plans require that employees to submit their medical records or receipts to the employer for reimbursement. As discussed above, the overwhelming majority (85%) of employers use third-party administrators or provide the type of benefit that would never require the employee to provide the employer with health information. For those plans that are self-administered, many employers build in other safe guards to ensure that private health information is kept confidential.

Responses to Recommendations

R4. Disallow the use of the employee HRA option.

Disagree. Employee Health Reimbursement Arrangements are federally regulated ERISA benefit plans. Disallowing a particular type of ERISA benefit plan would require hundreds of employers to alter their existing federally regulated benefit plans, fundamentally undermining the rational used by the 9th Circuit Court of Appeals to uphold the HSCO in Golden Gate Restaurant Association v. City and County of San Francisco, 546 F.3d 639, 656 (2008) ("the Ordinance affects employers, but it "leaves[s] plan administrators right where they would be in any case…The scheme does not force employers to provide any particular employee benefits or plans, to alter existing plans, or to even provide ERISA plans or employee benefits at all.") There is no question that disallowing a particular type of benefit plan currently used by hundreds of employers for thousands of employees would force employers to change their existing benefit plans. As a result, any change to the HSCO which would disallow the use of the employer HRA option would be preempted by ERISA.

R5. Eliminate time limits for employees to use their MRA funds.

No position. GGRA does not have a position on whether the City should eliminate the time limits for employees enrolled in the City's MRA option. However, it would seem only fair that the City would be subject to the same time limits which it imposes on private HRAs.