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JOHN ST. CROIX
EXECUTIVE DIRECTOR

Date: July 17, 2013
To: Members, Ethics Commission
From: John St. Croix, Executive Director
By: Catherine Argumedo, Investigator/Legal Analyst
Garrett Chatfield, Investigator/Legal Analyst
Re: Policy Proposals for Enforcement Settlements and Penalties

INTRODUCTION

At its March 24, 2008 meeting, the Ethics Commission approved several policy directives, including one that provided that all forfeiture activities would be handled by Enforcement staff commencing with the semi-annual report due on July 31, 2008. For a number of reasons, including a lack of staff and staff turnovers, Enforcement staff has until now not handled forfeitures. Staff now proposes to implement that policy directive, effective with this November's election. Accordingly, staff proposes that the Commission approve a set of policies to establish fixed penalties for certain campaign finance violations that are fairly straight-forward. These policies generally clarify and to some extent simplify procedures that are already set forth in the Commission's Regulations for Investigations and Enforcement Proceedings.

This approach would achieve several objectives:

- 1) Commission resources will be better allocated to investigate more complex violations, as staff will be freed from engaging in protracted negotiation discussions;
- 2) Filers and contributors will be further encouraged to comply with contribution limits and disclosure requirements;
- 3) Filers and contributors will be apprised in advance of the consequence of committing one or more of these violations;
- 4) These matters would be handled in a more timely manner;
- 5) The regulated community and the public would be assured that violations of the laws subject to these policies will be handled in the same manner; and

- 6) The Commission would ensure that the public harm is minimized by having the filers report their activity or amend previous filings as soon as possible.

Staff proposes that the Commission adopt a series of policies that will give more structure and cohesion to how it will handle violations of certain sections of the Campaign Finance Reform Ordinance (“CFRO”), San Francisco Campaign and Governmental Conduct Code (“C&GC Code”) section 1.100, et seq. Violations of the sections identified in this memo are generally discovered during a review of campaign finance statements or other disclosure statements and, in general require little, if any, additional investigation or other evidence to show that the violation occurred. While the policies will generally require a respondent to enter into a stipulated order with the Commission, each respondent remains free to exercise his or her rights under the Enforcement Regulations to move through the hearing process for any alleged violation of law.

In addition, staff proposes that these policies, if adopted, remain effective until modified or rescinded by majority vote of the Commission. Staff would be bound by the adopted policies regarding these violations until changed by the Commission. The Commission would retain the authority to approve or disapprove the stipulation and settlement amounts. The policies would be posted on the Commission website and included in relevant training materials.

If there is more than one violation, either multiple instances of the same code section and/or for different code sections, respondents would be liable for the penalty amount of each violation. If a violation pertains to a law that requires a campaign or other disclosure statement to be amended, the amended statement must be filed prior to the stipulation’s approval.

Staff welcomes suggestions from the Commission and the public. If approved, these policy proposals would be effective for the November 2013 election.

VIOLATIONS OF CFRO SECTION 1.114 BY CANDIDATES

CFRO section 1.114(a)(1) prohibits a candidate committee from soliciting or accepting a contribution from any person that will cause the contribution received from that person to exceed \$500. Section 1.114(b) prohibits any corporation from making a contribution to a candidate committee. Section 1.114(e) states that if the cumulative amount of contributions received from a contributor is \$100 or more, the committee may not deposit any contribution unless the committee has the following information: the contributor’s full name; the contributor’s street address; the contributor’s occupation; and the name of the contributor’s employer or, if the contributor is self-employed, the name of the contributor’s business.¹

¹ Section 1.114(d) states that for purposes of the contribution limits, the contributions of an entity whose contributions are controlled by any individual must be aggregated with contributions made by that individual and any other entity whose contributions are directed and controlled by the same individual. Because violations of section 1.114(d) are not easily discovered during a review of campaign disclosure statements, staff does not recommend including such violations into the proposed settlement and penalties scheme. Instead, such violations will be handled via the normal course of handling violations pursuant to the Commission’s Regulations for Investigations and Enforcement Proceedings.

In addition, section 1.114(c), adopted by the voters as part of Proposition O in 2000, sets limits on the amount of contributions a person may make to non-candidate committees that make expenditures to support or oppose

Under section 1.114(f), each committee that receives a contribution that exceeds the contribution limit or that does not comply with the other requirements of section 1.114 “shall pay promptly” the excess amount to the Ethics Commission. Staff proposes the following schedule of settlement and penalties to govern respondent candidates/candidate committees that violate section 1.114.

1. If, during a preliminary review, there is a reason to believe that a candidate committee may have committed a violation of any part of section 1.114, Enforcement staff will notify the candidate committee of the violation(s) and advise that the matter is in preliminary review. The notice will provide the following information:
 - a. The committee has five business days to forfeit the excess contribution or provide evidence as to why there is not a violation; and
 - b. In addition to forfeiting the excess contribution, an enforcement action will be initiated immediately after the 5th business day; and
 - c. A Probable Cause Report will be issued 21 business days after the enforcement action is initiated.
2. If evidence is presented prior to the deadline under 1.a. demonstrating that there is no violation, the matter will be dismissed by the Executive Director.
3. If evidence is presented after the deadline demonstrating that there is no violation, the Commission will review the evidence and determine whether the matter should be dismissed in closed session.
4. If no exonerating evidence is presented prior to the deadline, respondent must forfeit the amount of each excess contribution. In addition, a formal enforcement action will be initiated with the following schedule for stipulated orders:
 - a. Stipulation prior to issuance of probable cause report – respondent must sign stipulation stating that a violation(s) occurred and pay a settlement amount equal to two times the amount of the total excess contribution(s) but not to exceed \$5,000 per violation (mitigation/aggravation factors may apply).
 - b. Stipulation after issuance of probable cause report – respondent must sign stipulation stating that a violation(s) occurred and pay a settlement amount equal to three times the amount of the total excess contribution(s) but not to exceed \$5,000 per violation (mitigation/aggravation factors may apply).

candidates. On September 20, 2007, a federal district court issued a preliminary injunction enjoining enforcement of section 1.114(c); since then, the Commission has not enforced the section. The court has since issued a permanent injunction prohibiting the City from enforcing section 1.114(c).

- c. Stipulation after the Commission makes a finding of probable cause – respondent must sign stipulation stating that a violation(s) occurred and pay a settlement amount of four times the amount of the total excess contribution(s) but not to exceed \$5,000 per violation (mitigation/aggravation factors may apply).

VIOLATIONS OF CFRO SECTION 1.114(e) BY COMMITTEES

As mentioned, section 1.114(e) provides that no committee – not just candidate committees – may deposit any contribution that causes the total amount of contributions received from a contributor to total \$100 or more unless the committee has information regarding the contributor’s full name, street address and occupation. Staff proposes that the same procedures set forth above regarding violations of section 1.114(e) by candidate committees apply also to other committees that file reports with the Ethics Commission.

VIOLATIONS OF CFRO SECTION 1.114(a) BY CONTRIBUTORS

Section 1.114(a)(1) prohibits any person other than a candidate from making a contribution that exceeds \$500 to a candidate committee; section 1.114(a)(2) prohibits any person from making a contribution that will cause the total amount contributed by such person to all candidate committees in an election to exceed \$500 multiplied by the number of City elective offices to be voted on in that election. On June 24, 2013, the Commission approved the issuance of a Contributor Guide. Now that this guide is available to the public, contributors are on notice that they are personally subject to the provisions set forth in section 1.114. Staff proposes the following schedule of settlement and penalties to govern respondent contributors who violate section 1.114.

1. If, during a preliminary review, there is a reason to believe that a contributor may have committed a violation of any part of section 1.114, Enforcement staff will notify the contributor of the violation(s) and advise that the matter is in preliminary review. The notice will provide the following information:
 - a. The contributor has five business days to provide evidence as to why there is not a violation;
 - b. If no such evidence is provided, an enforcement action will be initiated immediately after the 5th business day; and
 - c. A Probable Cause Report will be issued 21 business days after the enforcement action is initiated.
2. If evidence is presented prior to the deadline demonstrating that there is no violation, the matter will be dismissed by the Executive Director.
3. If evidence is presented after the deadline demonstrating that there is no violation, the Commission will review the evidence and determine whether the matter should be dismissed in closed session.

4. If no exonerating evidence is presented prior to the deadline, a formal enforcement action will be initiated with the following schedule for stipulated orders:

a. First Offense – respondent contributor must sign a stipulation agreeing that he or she violated the law. No fine/penalty amount will be assessed. If respondent contributor refuses to sign a stipulation, staff will issue a Probable Cause Report and follow the schedule in sections b.ii and b.iii below.

b. Two or More Offenses:

i. Stipulation prior to issuance of probable cause report – respondent must sign stipulation stating that a violation(s) occurred and pay a settlement amount equal to two times the amount of the total excess contribution(s) but not to exceed \$5,000 per violation (mitigation/aggravation factors may apply).

ii. Stipulation after issuance of probable cause report – respondent must sign stipulation stating that a violation(s) occurred and pay a settlement amount equal to three times the amount of the total excess contribution(s) but not to exceed \$5,000 per violation (mitigation/aggravation factors may apply).

iii. Stipulation after the Commission makes a finding of probable cause – respondent must sign stipulation stating that a violation(s) occurred and pay a settlement amount of four times the amount of the total excess contribution(s) but not to exceed \$5,000 per violation (mitigation/aggravation factors may apply).

VIOLATIONS OF CFRO SECTION 1.116

CFRO section 1.116 sets limits on the amount of money a candidate may loan to his or her candidate committee. The limits are \$15,000 for a candidate for the Board of Supervisors, the Board of Education or the Community College District, \$120,000 for a candidate for Mayor, or \$35,000 for a candidate for Assessor, Public Defender, City Attorney, Treasurer, District Attorney, or Sheriff.² Under section 1.116, in addition to any other penalty, a loan made by a candidate to his or her campaign in excess of the allowable amounts is deemed a contribution to the campaign and may not be repaid to the candidate. Staff proposes the following schedule of settlement and penalties to govern respondent candidates who violate section 1.116.

1. If, during a preliminary review, there is a reason to believe that a candidate may have committed a violation of section 1.116, Enforcement staff will notify the candidate of the violation(s) and advise that the matter is in preliminary review. The notice will provide the following information:

a. The candidate has five business days to provide evidence as to why there is not a violation; and

² Publicly-financed candidates must agree not to loan or donate to their campaigns, in total, more than \$5,000 of their own money; nor may they accept any loan from anyone else. CFRO § 1.140(a)(1)(D). Staff does not propose that the settlement and penalties structure discussed in this memo apply to violations of section 1.140(a)(1)(D).

- b. An enforcement action will be initiated immediately after the 5th business day; and
 - c. A Probable Cause Report will be issued 21 business days after the enforcement action is initiated.
2. If evidence is presented prior to the deadline demonstrating that there is no violation, the matter will be dismissed by the Executive Director.
 3. If evidence is presented after the deadline demonstrating that there is no violation, the Commission will review the evidence and determine whether the matter should be dismissed in closed session.
 4. If no exonerating evidence is presented prior to the deadline, a formal enforcement action will be initiated with the following schedule for stipulated orders:
 - a. Stipulation prior to issuance of probable cause report – respondent must sign stipulation stating that a violation(s) occurred and pay a settlement amount equal to 20 percent of the maximum fine per violation, or \$1,000 (mitigation/aggravation factors may apply).
 - b. Stipulation after issuance of probable cause report – respondent must sign stipulation stating that a violation(s) occurred and pay a settlement amount of 50 percent of the maximum fine per violation, or \$2,500 (mitigation/aggravation factors may apply).
 - c. Stipulation after the Commission makes a finding of probable cause – respondent must sign stipulation stating that a violation(s) occurred and pay a settlement amount equal to 80 percent of the maximum fine per violation per violation, or \$4,000 (mitigation/aggravation factors may apply).

VIOLATIONS OF SF C&GCC §§ 1.161, 1.161.5, OR 1.162

Several sections of the CFRO require written disclaimer statements that, among other things, identify who paid for the mass mailing (section 1.161), electioneering communication (section 1.161.5), and campaign advertisement (section 1.162. These printed disclosures must be in at least 14 point type and in a color or print that contrasts with the background so as to be easily legible to the intended public.

The Commission recently settled several matters related to the font size of campaign advertisements. Staff now proposes that the following schedule of settlement and penalties govern committees that violate the disclaimer and disclosure sections of the CFRO.

1. If, during a preliminary review, there is a reason to believe that a committee may have committed a violation of any part of section 1.161, 1.161.5, or 1.162, Enforcement staff will notify the committee and advise that the matter is in preliminary review. The notice will provide the following information:

- a. The committee has five business days to provide evidence as to why there is not a violation; and
 - b. An enforcement action will be initiated immediately after the 5th business day; and
 - c. A Probable Cause Report will be issued 21 business days after the enforcement action is initiated.
2. If evidence is presented prior to the deadline demonstrating that there is no violation, the matter will be dismissed by the Executive Director.
 3. If evidence is presented after the deadline demonstrating that there is no violation, the Commission will review the evidence and determine whether the matter should be dismissed in closed session.
 4. If no exonerating evidence is presented prior to the deadline, a formal enforcement action will be initiated with the following schedule for stipulated orders:
 - a. Stipulation prior to issuance of probable cause report – respondent must sign stipulation stating that a violation(s) occurred and pay a settlement amount equal to 20 percent of the maximum fine per violation, or \$1,000 (mitigation/aggravation factors may apply).
 - b. Stipulation after issuance of probable cause report – respondent must sign stipulation stating that a violation(s) occurred and pay a settlement amount equal to 50 percent of the maximum fine per violation, or \$2,500 (mitigation/aggravation factors may apply).
 - c. Stipulation after the Commission makes a finding of probable cause – respondent must sign stipulation stating that a violation(s) occurred and pay a settlement amount equal to 80 percent of the maximum fine per violation, or \$4,000 (mitigation/aggravation factors may apply).

FACTORS IN MITIGATION AND AGGRAVATION

Staff has two suggestions regarding the consideration of mitigating and aggravating factors. While one provides for a more clear-cut consideration of factors and may result in quicker settlements, the other allows the Commission to balance factors to arrive at possibly more equitable solutions. Staff welcomes the Commission's views on this.

Under the first scenario, each factor in mitigation will reduce a settlement amount by five percent. For example, if a fine is \$1,500 with three factors in mitigation and no factors in aggravation, the fine will be reduced by 15 percent – or \$225 – becoming a fine of \$1,275. Each factor in aggravation will increase the settlement amount by five percent. For example, if a fine is \$1,500 with three factors in aggravation and no factors in mitigation, the fine will be increased by 15 percent – or \$225 – becoming a fine of \$1,725.

Under the second scenario, the Commission will consider each mitigating or aggravating factor to determine how much weight should be given to each factor. For example, an intent to conceal, deceive or mislead will be considered much more egregious and weigh more heavily against a respondent, so much so that the existence of mitigating factors may not offset it.

1. Mitigation Factors:

- Absence of any intention to conceal, deceive, or mislead
- Violation was negligent or inadvertent
- Violation was isolated and not part of a pattern
- No prior record of violations of law with the Commission
- The degree to which the Respondent cooperated with the investigation
- The degree to which the Respondent demonstrated a willingness to remedy any violations (only applicable if a respondent agrees to a stipulation prior to issuance of probable cause report)
- Respondent filed all required disclosure statements and/or amendments within 14 days of initial contact by Enforcement staff
- A disclosure containing the required information appeared on a mass mailing, electioneering communication, or campaign advertisement, but the disclosure was in font size that was not 14 point

2. Aggravation Factors:

- Evidence shows an intent to conceal, deceive, or mislead
- Violation was deliberate
- Violation was part of a pattern
- Prior record of violations of law with the Commission
- The degree to which the respondent was uncooperative with the investigation
- The degree to which the respondent failed to demonstrate a willingness to remedy any violations
- Respondent failed to file required disclosure statements and/or amendments within 14 days of initial contact by Enforcement staff