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JESSE MAINARDI
ACTING EXECUTIVE
DIRECTOR

Date: August 19, 2015
To: Members, Ethics Commission
From: Jesse Mainardi, Acting Executive Director
Re: Proposed Modification of Fixed Penalty Policy for CFRO Violations

Summary of Proposed Commission Action

Staff requests authorization to propose, for Commission approval, warning letters for minor disclaimer violations instead of fines when staff believes that the facts do not warrant strict adherence to the Commission's current policies for such violations. The Commission would retain the authority to accept or reject the proposed warning letters.

Discussion

In July 2013, the Commission approved a number of policies that imposed standard enforcement procedures and fixed penalties for certain violations of the City's Campaign Finance Reform Ordinance ("CFRO"). Violations of the City's disclaimer requirements (i.e., "Paid for by" rules) were covered by these policies. (See attachment, pp. 5-6.) Under these policies, the Commission is typically required to impose fines on campaigns that have failed to print disclaimers on mailers in the required font size.

In June 2015, the Board of Supervisors and the Mayor approved numerous amendments to CFRO, including changes to the City's disclaimer rules. Among other things, the CFRO amendments changed the required font sizes on mailers, mandated a reference to the Commission's website, and lowered the threshold for disclosing major donors to independent expenditure and ballot measure committees. Staff released guidance regarding these changes to the regulated community at the end of July.

Due to these amendments, the current policies for violations of disclaimer requirements are out-of-date. For example, the policies currently cite incorrect provisions of the Campaign and Governmental Conduct Code and refer to the prior 14-point type disclaimer requirements, instead of the current 12-point type standard. Staff plans to update these policies in the near future.

But until staff has the opportunity to update these policies, it would benefit the public and campaigns subject to these disclaimer requirements to clarify the

Commission's current approach to violations of disclaimer requirements. In addition, given the recent transition to the new rules, staff anticipates a greater than usual number of inadvertent disclaimer violations this election cycle. For these reasons, staff believes that certain minor disclaimer violations may warrant a warning letter instead of strict adherence to the fine mandated by the current policies.

By way of example, staff believes that a warning letter may be appropriate for a campaign: (1) without any history of violations; (2) whose disclaimer is generally complete, but is printed in, say, 10 point font (instead of 12) or is missing the required reference to the Ethics Commission's website; and (3) which did not deliberately fail to comply. However, staff believes that a fixed penalty under the current policies is more appropriate if, for example, a mailer which did not include any disclaimer at all.

Therefore, staff requests that the Commission authorize staff to propose warning letters in enforcement matters concerning minor disclaimer violations instead of fines when staff believes that the facts do not warrant strict adherence to the Commission's policies for fixed enforcement penalties. Staff would consider such authorization to cover all communications for the 2015 election. The Commission would of course retain the authority to reject a proposed warning letter in any enforcement matter, and direct staff to pursue appropriate fines.

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Attachment

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Ethics Commission Policies re Fixed Penalties for Violations of Certain CFRO Sections

INTRODUCTION

At its July 22, 2013 meeting, the Ethics Commission approved the following policies to establish fixed penalties for violations of certain provisions 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 below 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.

These policies will be effective for activities related to the November 2013 election and will remain effective until modified or rescinded by majority vote of the Commission. Staff is bound by the adopted policies regarding these violations until changed by the Commission. The Commission retains the authority to approve or disapprove the stipulation and settlement amounts.

If there is more than one violation, either multiple instances of the same code section and/or different code sections, Respondent will 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.

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 the 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, they are not included in this

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, for deposit into the City’s General Fund.

The Commission approved 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 section 1.114(a)(1), (b) or (e), 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 fourteen (14) days to forfeit the excess contribution or provide evidence as to why there is not a violation; and
 - b. If no such evidence is presented, in addition to forfeiting the excess contribution, an enforcement action will be initiated immediately after the fourteenth (14th) 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 14-day deadline demonstrating that there is no violation, the matter will be dismissed by the Executive Director.
3. If evidence is presented after the 14-day 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 14-day 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).
 - 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).

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 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).

VIOLATIONS OF CFRO SECTION 1.114(e) BY COMMITTEES

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. 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. The following schedule of settlement and penalties will 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 section 1.114(a)(1) or (a)(2), 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 fourteen (14) 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 fourteenth (14th) 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 14-day deadline demonstrating that there is no violation, the matter will be dismissed by the Executive Director.
3. If evidence is presented after the 14-day 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 14-day 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. The following schedule of settlement and penalties will 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 fourteen (14) days to provide evidence as to why there is not a violation; and
 - b. An enforcement action will be initiated immediately after the fourteenth (14th) 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 14-day deadline demonstrating that there is no violation, the matter will be dismissed by the Executive Director.
3. If evidence is presented after the 14-day 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 14-day 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).

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). The settlement and penalties structure discussed here do not apply to violations of section 1.140(a)(1)(D).

- 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 CFRO SECTIONS 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 following schedule of settlement and penalties will 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 fourteen (14) days to provide evidence as to why there is not a violation; and
 - b. An enforcement action will be initiated immediately after the fourteenth (14th) 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 14-day deadline demonstrating that there is no violation, the matter will be dismissed by the Executive Director.
3. If evidence is presented after the 14-day 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 14-day 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

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. The following lists of mitigation and aggravation factors are not exhaustive.

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 cooperated with the investigation
- The degree to which the demonstrated a willingness to remedy any violations (only applicable if a agrees to a stipulation prior to issuance of Probable Cause Report)
- 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 was uncooperative with the investigation
- The degree to which the failed to demonstrate a willingness to remedy any violations
- failed to file required disclosure statements and/or amendments within 14 days of initial contact by Enforcement staff