



# ETHICS COMMISSION

## CITY AND COUNTY OF SAN FRANCISCO

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EXECUTIVE DIRECTOR

Date: October 18, 2017

To: Members of the Ethics Commission

From: Jessica L. Blome, Deputy Director of Enforcement & Legal Affairs

RE: **Agenda Item 8: Staff's Proposed Draft Enforcement Regulations with Staff Responses to Written Public Comment**

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**Summary:** Staff provides draft Enforcement Regulations with annotated explanations for each change, as well as Staff's responses to written public comment.

**Action Requested:** Continued discussion and possible action. Staff look forward to receiving the Commission's policy guidance as well as additional public comment on the draft regulations.

On August 26, 2017, Staff presented the Commission with a memorandum outlining Staff's preliminary proposals to strengthen the Commission's Enforcement Regulations. In that memorandum, Staff made the following conceptual recommendations:

1. Delegate responsibility for conducting probable cause conferences and making probable cause determinations from the Ethics Commission to the Executive Director;
2. Delegate responsibility to conduct investigations to the Deputy Director for Enforcement;
3. Use the Executive Director's written determination of a Finding of Probable Cause as the charging document for administrative hearing purposes instead of creating a duplicative Accusation document for that purpose;
4. Require the Ethics Commission to consider proposed settlement agreements in public session and allow for certain stipulations to be heard by consent calendar;
5. Combine portions of the Ethics Commission Regulations for Handling Violations of the Sunshine Ordinance with the Enforcement Regulations, while preserving the integrity of both the authority and jurisdictional responsibilities of the Ethics Commission and Sunshine Ordinance Task Force under the City's Sunshine Ordinance;
6. Permit the Commission to enter Default Orders when respondent(s) fail to meet their obligation to participate in an enforcement action;
7. Codify Commission policy to waive late filing fees for filing deadlines that fall on weekends and City holidays and amend the late filing fee waiver policy to reflect the requirements of the enabling ordinances.

Based on its concepts memorandum, Staff hosted Interested Persons meetings on September 18 and September 20, 2017. Several members of the public appeared and provided verbal public comment regarding Staff's proposed conceptual changes. Staff accepted written public comment until October 15, 2017. Today, Staff provides the Commission Draft Enforcement Regulations with annotated explanations for proposed changes. Staff also provides responses to written public comment received prior to the October 15 deadline. Staff looks forward to receiving policy guidance from the Commission as well as additional verbal public comment regarding Staff's draft regulations at the October 23 meeting. Staff will incorporate those comments into a final draft to be published in early November and presented for action to the Commission in November.

### **Proposed Revisions**

In addition to the seven recommended conceptual changes identified above, Staff reorganized and streamlined its Enforcement Regulations. Staff finds the current version of the regulations to be unnecessarily complex, technical, and confusing. Related provisions appear in multiple sections of the current regulations, and many provisions of the "Miscellaneous" section might be relocated through restructuring.

Staff took care to classify each provision within the current regulations and reorganize them into a set of comprehensive rules that govern each stage of the enforcement process. Staff hopes this change will promote easier guidance for respondents and the public about how the enforcement process works and what will happen next in a certain matter by referring to one document. Staff looks forward to receiving public comment and Commission guidance at the October Commission meeting regarding its reorganization.

In line with its reorganization effort, Staff proposes repealing the existing Regulations for Handling Violations of the Sunshine Ordinance and incorporating the overall effect of those regulations into one general document. In the draft proposed regulations attached to this memorandum, Staff annotates the places where the Sunshine Ordinance Regulations are incorporated and provides more detailed rationale for its proposed merger.

Staff has previously explained its rationale for the seven proposed changes highlighted above. Staff additionally annotates the attached draft proposed regulations for the Commission and public's benefit in evaluating how the regulations are changing. In addition to those seven proposed changes—and in response to specific public comment—Staff also recommends that the Commission make two additional changes to the Enforcement Regulations.

1. Staff recommends allowing complainants alleging whistleblower retaliation pursuant to Section 4.115 of the San Francisco Campaign & Governmental Conduct Code an opportunity to participate in probable cause proceedings, should their complaint reach that stage of the administrative enforcement process. Retaliation complainants would be given an opportunity to review and respond to the Director of Enforcement's Probable Cause Report and add evidence they deem appropriate in the form of their own supplemental report. Staff is cognizant of the fact that

whistleblower retaliation complainants are differently situated from complainants alleging violations of the other laws within the Commission's jurisdiction and operate more like civil plaintiffs than other complainants. Because more is at stake personally for retaliation complainants, Staff finds that it is appropriate to give them more access to the probable cause process than other complainants.

2. Staff recommends adopting for the statute of limitations a tolling provision for fraudulent concealment and removing the provision giving the Commission authority to initiate enforcement proceedings within four years of Staff's discovery of the violation. This change would align the Commission's Enforcement Regulations with state law and its proposed update to the Campaign Finance Reform Ordinance.

Staff is also analyzing the benefits of incorporating the Commission's existing forfeiture policy into its Enforcement Regulations. Staff currently follows two policies adopted by the Ethics Commission in 2008. By incorporating the Commission's forfeiture policy into the Enforcement Regulations, Staff could bring much needed transparency to this important function. Staff seeks guidance from the Commission and the public regarding beneficial reforms in this area.

### **Staff's Specific Responses to Written Public Comment**

**Public Comment:** the Commission should provide more details in its section regarding stipulated orders, including incorporating the standards governing fines in administrative orders; that the stipulation language must be agreed to by both parties; a statement of policy providing that settlement saves time and resources for both the Commission and the respondent; that the Commission's final consideration of the stipulation is limited to the facts and law outlined in the stipulation; and making settlement negotiation details non-admissible in subsequent enforcement processes if settlement negotiations are unsuccessful.

**Staff Response:** Staff agrees that the penalty assessment process should be incorporated throughout the regulations. Staff also agrees that a statement of policy regarding the role of settlement is appropriate and that settlement negotiations details should be non-admissible in subsequent enforcement proceedings. Staff has, accordingly, incorporated these recommended revisions. Staff does not, however, believe that the Commission should be limited to the facts and law set forth in the stipulation if it decides to hold a public hearing on the proposed stipulation. Rather, the Commission should be able to consider all of the evidence and comment presented at that public hearing before making its final decision regarding settlement. In addition, Staff believes inserting a requirement that all parties agree to the language in a settlement is unnecessary. If the parties cannot agree on language, then the parties will not agree to the settlement without a regulation instructing them as such.

**Public Comment:** The Commission should clarify that its forfeiture process is part of the enforcement process and therefore confidential until final. The Commission should provide an opportunity to object to forfeiture orders before they become public.

**Staff Response:** Staff is evaluating this recommendation and will present further analysis regarding possible amendments to the Commission's forfeiture policy in November.

**Public Comment:** The Commission should adopt limiting regulations for the assessment of the treble damages fine authorized by the Charter.

**Staff Response:** Staff is proposing a penalty matrix that includes a requirement for consideration of the respondent's ability to pay if a respondent raises ability to pay as a mitigating factor. Staff believes its proposed penalty assessment matrix will resolve any concerns regarding excessive fines.

**Public Comment:** The Commission should clarify that it cannot initiate enforcement proceedings more than four year after the date of the alleged violation and adopt a tolling provision for intentional concealment.

**Staff Response:** Staff agrees and has made this change. Staff notes that the provision in the current regulations giving it authority to initiate enforcement proceedings four years after the Commission discovers the violation has no equivalent in related state law. See Cal. Gov't Code § 91000.5.

**Public Comment:** The proposed Enforcement Regulation changes are in line with recommendations from the Civil Grand Juries of 2010 and 2014.

**Staff Response:** Staff thanks the commenter for his observation.

**Public Comment:** The person who filed the complaint should be given an opportunity to comment or add information before the Commission or Executive Director makes her determination.

**Staff Response:** Staff has adopted this recommendation as to complainants alleging whistleblower retaliation. Staff declines to adopt this recommendation as to additional complainants. Staff finds that requiring notification of complainants outside the context of a retaliation complaint would be overly burdensome when compared to the probable benefit to the enforcement process because most complainants are observers or witnesses and not affected parties to a matter.

**Public Comment:** The Commission's administrative penalty should be greater than the State's penalty.

**Staff Response:** Staff cannot change the administrative penalty amount by regulation. Increasing the administrative penalty would require a change to San Francisco Charter Section C3.699-13.

**Public Comment:** The Commission should require that when it refers an order to an official or a Department, the official or Department should respond within thirty days.

**Staff Response:** Staff is not evaluating or recommending regulations regarding its authority to conduct official misconduct hearings pursuant to San Francisco Charter Section 15.105 at this time.

**Public Comment:** Whistleblower retaliation case determinations should be directly communicated to the Board of Supervisors, City Attorney, and Mayor, regardless of the outcome.

**Staff Response:** Staff strongly disagrees with this recommendation. In order to protect the identify of whistleblower retaliation complainants, their names must be kept confidential and withheld from as many officials with the power to retaliate against their whistleblowing activity as possible.

**Public Comment:** The Commission should make investigation mandatory whenever the Commission has concurrent civil or criminal enforcement authority, regardless of whether charges are brought.

**Staff Response.** Staff strongly disagrees with this recommendation. When the District Attorney brings charges in a criminal case, Staff's administrative investigation could compromise the District Attorney's criminal case. Staff has adopted a 90-day suspension policy to encourage concurrent investigations. The Commission should not make Staff's investigation mandatory, especially where serious criminal charges are at stake.

**Public Comment:** The regulations should require a translator or signer in investigations where it is warranted.

**Staff Response:** This requirement is unnecessary. Staff obtains the services of a translator or signer whenever necessary without a regulation mandating it.

**Public Comment:** The Executive Director must inform the Commission in cases when the Fair Political Practices Commission (FPPC) or other enforcement agency contacts her and suggests a joint enforcement action.

**Staff Response:** Staff does not believe a regulation requiring the Executive Director to inform the Commission each time it is invited to join a joint investigation is necessary. Moreover, the premature revelation of such information to individual Commissioners may lead to their knowing facts that should not be made available to Commission members until the Commission is adjudicating the merits of an enforcement matter.



# San Francisco Ethics Commission

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## Enforcement Regulations<sup>1</sup>

### Section 1. Preamble

The San Francisco Ethics Commission adopts the following regulations applicable to the Commission's enforcement authority as granted by the San Francisco City Charter and Municipal Code.

- A. Purpose.** These regulations are intended to ensure the fair, just, and timely review, investigation, and hearing of complaints presented to the Commission by doing the following:
1. Setting and maintaining objective standards for the investigation and prosecution of matters brought before the Commission;
  2. Eliminating any political or improper influence in the investigation and prosecution of persons accused of violations of laws within the Commission's jurisdiction;
  3. Protecting the privacy rights of those accused of ethics violations by maintaining the confidentiality of complaints filed with, and investigations conducted by, the Commission
  4. Providing a fair hearing for persons and entities accused of violations;
  5. Ensuring timely enforcement and complaint resolution;
  6. Coordinating and sharing with other governmental agencies the responsibility for investigations and prosecutions of complaints, whenever consistent with the interests of justice; and
  7. Delegating to the Commission staff maximum discretion in the handling and resolution of complaints at staff level, while retaining oversight of those staff activities.
- B. Enforcement Authority.** These regulations are applicable to potential violations of City laws relating to campaign finance, lobbying, campaign consulting, conflicts of interest, governmental ethics, the San Francisco Sunshine Ordinance, and the Whistleblower Protection Ordinance, as well as State laws relating to campaign finance, conflicts of interest, or governmental ethics, including, but not limited to: San Francisco Charter section 15.100 *et seq.* and Appendix C (Ethics); the San Francisco Campaign and Governmental Conduct Code; San Francisco Administrative Code, Chapter 67, *et seq.*; the Political Reform Act of 1974, Government Code section 81000 *et seq.*; Government Code section 1090 *et seq.*; and Government Code section 3201, *et seq.*

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<sup>1</sup> *Effective Date: July 5, 1997, Includes technical amendments effective April 13, 2002; Streamlined Process for Complaints Alleging a Failure to File Campaign Finance Disclosure Reports effective August 15, 2004; amendments effective October 10, 2005; amendments effective March 10, 2006; amendments effective November 10, 2006; amendments effective December 18, 2009; amendments effective January 8, 2010; amendments effective November 11, 2011; amendments effective March 29, 2013; and amendments effective March 28, 2016.*

**Staff Note 1.** The public will notice significant changes in formatting and reorganization throughout. Substantively, Staff deleted definitions for words that bear obvious meaning: “Business day,” “Credible,” “Day,” “Exculpatory information,” “Mitigating information,” and “Stipulated Order.” Staff does not think additional explanation is necessary for the public to understand what these words mean when used in the Enforcement Regulations.

## Section 2. Definitions

For purposes of these regulations, the following definitions will apply:

- A. “City” means the City and County of San Francisco.
- B. “Commission” means the Ethics Commission.
- C. “Complainant” means a person or entity making a complaint.
- D. “Enforcement action” means an action pursuant to San Francisco Charter section C3.699-13 other than opening an investigation.
- E. “Director of Enforcement” means the Commission staff member who is in charge of enforcement.
- F. “Deliver” means transmit by U.S. mail, electronic mail, or personal delivery to the individual’s registered address with the Ethics Commission, a business entity’s registered agent, the business entity’s principal place of business, or by leaving a copy of the document or thing at an individual’s usual place of abode with someone of suitable age and discretion who resides there. Delivery is effective upon the date of delivery, not the date of receipt.
- G. “Executive Director” or “Director” means the Executive Director of the Commission or the Executive Director’s designee.
- H. “Probable cause” means evidence sufficient to lead a person of ordinary caution and prudence to believe or entertain a strong suspicion that a proposed respondent committed or caused a violation of law.
- I. “Respondent” means a person or entity that is alleged to have committed a violation of law.
- J. “Staff” means the Commission’s full-time professional staff.
- K. “Violation of law” means a violation of City law relating to campaign finance, lobbying, campaign consulting, conflicts of interest, governmental ethics, the San Francisco Sunshine Ordinance, and the Whistleblower Protection Ordinance, as well as State laws relating to campaign finance, conflicts of interest, or governmental ethics, including, but not limited to: San Francisco Charter section 15.100 *et seq.* and Appendix C (Ethics); the San Francisco Campaign and Governmental Conduct Code; San Francisco Administrative Code, Chapter 67, *et seq.*; the Political Reform Act of 1974, Government Code section 81000 *et seq.*; Government Code section 1090 *et seq.*; and Government Code section 3201, *et seq.*

**Staff Note 2.** Section 3 has been reorganized and supplemented for clarity and readability. Staff has provided appended comments explaining its rationale for substantive changes.

### **Section 3. Filing a Complaint**

A complaint alleging a violation of law may be submitted by any person, including a member of the public, any employee or official of the City, or any member of the Commission.

- A. Sworn Complaints.** Any person or entity may file a sworn complaint alleging a violation of law. Sworn complaints must be made in writing on a form designated by the Executive Director or in a writing that contains the information substantially requested in the Director's designated form.
- 1. Content of Sworn Complaints.** Sworn complaints must be signed by the complainant under penalty of perjury. Electronic signatures that conform with the Commission's electronic signature policy sufficiently comply with this requirement. Sworn complaints should include the following facts:
    - i. The name and address of the respondent;
    - ii. The facts constituting an alleged violation(s) of law;
    - iii. The names and addresses of witnesses, if any; and
    - iv. Copies of documents or other evidence that may be relevant to proving the fact(s) constituting the alleged violation(s), if any.
  - 2. Effect of Sworn Complaints.** The Director of Enforcement must process and evaluate all sworn complaints, pursuant to procedure outlined in Section 4, Preliminary Review.
- B. Informal Complaints.** Any person or entity may file an informal complaint by telephone, in person, or in a writing that alleges a violation of law.
- 1. Content of Informal Complaints.** An informal complaint should include the name of the person or organization believed to have violated the law and the facts of the alleged violation. A complaint submitted on the prescribed complaint form that does not meet the requirements of a formal complaint will be considered an informal complaint.
  - 2. Effect of Informal Complaints.** The Enforcement Director has the discretion to review informal complaints. In exercising that discretion, the Enforcement Director should consider the nature of the alleged violation and whether the information contained in the complaint permits review and investigation of the alleged violations.
- C. Anonymous Complaints.** Complaints may be submitted anonymously, but such complaints will be treated as informal complaints.



- D. Commissioner-initiated Complaints.** Any member of the Commission who submits a formal or informal complaint must recuse him or herself from all consideration, review, investigation, or hearing of that complaint.

**Staff Note 3.** This provision (Section 3(D)) is new. Staff is clarifying that members of the Commission who file complaints for investigation by Staff must recuse themselves from adjudicating the merits of any subsequent investigation.

- E. Complaints alleging violations of the Sunshine Ordinance.** Pursuant to section 67.34 of the San Francisco Administrative Code, the Commission will investigate complaints containing credible allegations against elected official(s) or department head(s) alleging willful violations of the Sunshine Ordinance. If a complaint filed with the Commission does not meet the criteria set forth in section 67.34, the Commission will refer it to the Task Force.

**Staff Note 4.** Staff proposes the simultaneous repeal of the Ethics Commission’s Regulations for Handling Violations of the Sunshine Ordinance and incorporating the spirit of those regulations in one omnibus set of Enforcement Regulations. Section 3(E) makes clear that original complaints involving violations of the Sunshine Ordinance over which the Commission has jurisdiction will be investigated in the normal course of business, pursuant to the Commission’s general Enforcement Regulations. Previously, complaints involving willful violations of the Sunshine Ordinance by department heads and elected officials were handled pursuant to Chapter Three of the Sunshine Ordinance Enforcement Regulations.

- F. Withdrawal of Complaint.** The Commission may continue to investigate a complaint even if the complainant withdraws it.

**Staff Note 5.** Section 4 has been reorganized with one substantive change: the Enforcement Regulations now incorporate SF Charter Section C3.699-13’s differentiation between sworn complaints and informal complaints.

## **Section 4. Preliminary Review of Complaints**

- A. Preliminary Review.** Upon receipt of a sworn complaint, the Director of Enforcement will conduct a preliminary review of the complaint to determine whether there is reason to believe a violation of law may have occurred. If the Director of Enforcement determines there is reason to believe a violation of law has occurred, the Director of Enforcement will open an investigation. This preliminary review may include reviewing documents, communicating with the complainant or respondent, and any other inquiry to determine whether a full investigation is warranted.
- B. Complaint Dismissal.** If, based on the allegations and information contained in a complaint, and the Director of Enforcement’s preliminary review, the Director of Enforcement determines that no violation of law has likely occurred, the Executive Director may dismiss the complaint. Reasons for dismissal include but are not limited to:

**Staff Note 6.** Staff added the criterion in Section 4(B)(1) to the list of justifications supporting dismissal of complaints due to the voluminous nature of complaints Staff typically receive with little to no supporting documentation, the absence of which renders investigation impossible, overly burdensome, or unfruitful.

1. The complaint does not include enough information to support further investigation.
2. Credible evidence clearly refutes the allegation.
3. The allegations, if true, do not constitute a violation of law.
4. The complaint contains an expression of opinions, rather than specific allegations.
5. The allegations contained in the complaint are already under investigation, or already have been resolved, by the Commission or another law enforcement agency.

**C. Complaint Referral.** The Director of Enforcement, with the concurrence of the Executive Director, may refer the matter to another government agency if the Director of Enforcement determines that the agency may more appropriately resolve the allegations in the complaint or enforce the applicable provisions of law. If the Executive Director concurs with the Director of Enforcement’s recommendation, the Executive Director will notify the Commission pursuant to subsection E.

**D. Report to the Commission.** The Director of Enforcement will provide a monthly summary to the Commission of each complaint dismissed including the reasons for dismissal provided. That summary will comply with the confidentiality requirements of the Charter.

1. **Whistleblower Retaliation Quarterly Report.** No less than quarterly, the Director of Enforcement will provide a summary report to the Commission of the status of all complaints still under preliminary review that allege retaliation against whistleblowers. For matters that have been under preliminary review for more than 90 calendar days, the Director of Enforcement will provide an explanation for why the Commission’s staff has not completed its preliminary review as well as a target date for completion.

**E. Final Decision.** A dismissal or closure of a complaint, after notification to the Commission pursuant to this Section, is a final decision and represents the end of the administrative process. No further action will be taken by the Commission to review or investigate the allegations contained in the complaint. If a complainant desires further review, the complainant must follow the procedures set forth in Section 1094.5(a) of the California Code of Civil Procedure governing judicial review of any final administrative order or decision.

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**Staff Note 7.** Section 5 has been substantially revised to reflect Staff's policy goal, as articulated in its [August 24, 2017, Staff memorandum](#), to give the Director of Enforcement authority to open and conduct investigations independent from the Executive Director, who will conduct Probable Cause Conferences and develop recommended probable cause determinations for the Commission's review and approval.

## Section 5. Investigation

- A. Open Investigation.** If, after a preliminary review of the complaint, the Director of Enforcement determines there is reason to believe a violation of law has occurred, then the Director of Enforcement will open an investigation into the allegations contained in the complaint. An investigation may include, but need not be limited to, the interview of the respondent(s) and any witnesses, interviews of respondent(s) and/or witnesses, and the gathering/collection and review of documentary and other evidence.
1. Upon the Director of Enforcement's decision to open an investigation, the Director of Enforcement will immediately forward the complaint to the District Attorney and City Attorney. Within 10 business days after receipt of the complaint, the District Attorney and City Attorney will inform the Director of Enforcement in writing regarding whether the District Attorney or City Attorney has initiated or intends to pursue an investigation of the matter.
  2. Within 14 calendar days after receiving notification that neither the District Attorney nor City Attorney intends to pursue an investigation, the Director of Enforcement will notify in writing the complainant of the action, if any, the commission has taken or plans to take on the complaint, together with the reasons for such action or inaction. If no decision has been made within 14 calendar days after receiving notification that neither the District Attorney nor City Attorney intends to pursue an investigation, the person who made the complaint will be notified of the reasons for the delay and will subsequently receive notification as provided above.
- B. Ex Parte Communication.** Once an investigation is opened and until the Commission has made a final decision or order, whether by stipulation or otherwise, members of the Commission will not engage in oral or written communications with the parties or any member of the public outside of a Commission meeting, witness interview or examination, or settlement conference regarding the merits of an enforcement action.
- C. Subpoenas and Subpoenas Duces Tecum.**
1. **Issuing Subpoenas.** The Executive Director may issue subpoenas and *subpoenas duces tecum* on behalf of the Commission. A subpoena or *subpoena duces tecum* may not be issued unless the Executive Director finds that the person to be subpoenaed or the information to be requested in the *subpoena duces tecum* is relevant to a specific matter under investigation or that the person or entity to be subpoenaed controls relevant information.

2. **Notice Required.** If a *subpoena duces tecum* seeks the production of either personal or financial records, the Enforcement Director will provide notice as required by California Government Code, section 7460, *et seq.*
3. **Service.** Subpoenas will be served at least 15 calendar days before the time required for attendance. *Subpoenas duces tecum* will be served as least 25 calendar days before the time required for attendance or production of the requested documents. Service must be made by delivering the subpoena or subpoena duces tecum as set forth in Section 2(G) herein.
4. **Compliance.**
  - i. If the Director of Enforcement consents, any person subject to a *subpoena duces tecum* may satisfy the *subpoena duces tecum* by delivering the requested documents together with an affidavit in compliance with section 1561 of the California Evidence Code.
  - ii. If any person or entity refuses to comply with a subpoena or *subpoena duces tecum*, the Executive Director may ask the City Attorney to petition the San Francisco Superior Court for an order compelling compliance.

**Staff Note 8.** In Section 5(C)(5), Staff included a process for objecting to subpoenas similar to the process used by the Los Angeles City Ethics Commission. See [Los Angeles Administrative Code § 24.24](#). Staff hopes to increase accountability and transparency in its use of subpoenas, as the Executive Director has discretion to issue them independently.

5. **Objections.**
  - i. Any person or entity served with a subpoena or *subpoena duces tecum* may object by filing written objections with the Executive Director at least 5 calendar days before the time required for attendance or production of the requested documents.
  - ii. The Executive Director will rule on the objections and issue a written order at least one calendar day before the time required for attendance or production of the requested documents. The Executive Director’s decision is final.
  - iii. Failure to file timely objections with the Executive Director waives all grounds for any objection.
  - iv. Any person or entity that files a motion to quash or modify a subpoena or *subpoena duces tecum* in Superior Court must inform the Executive Director in writing on the same day the motion is filed.

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**Staff Note 9.** In Section 5(D), Staff is incorporating the exact language found in SF Charter Section C3-699.13, which requires that investigations be conducted confidentially and which penalizes disclosure as official misconduct.

**D. Confidentiality: Disclosure deemed Official Misconduct.** The investigation will be conducted in a confidential manner. Records of any investigation will be considered confidential information to the extent permitted by state law. All investigative documents, including notes and memoranda, created prior to the probable cause determination, such as the complaint, will remain confidential. All investigative documents, including notes and memoranda, created by the Executive Director and his or her staff after the probable cause determination shall be confidential, unless and until any such documents are introduced as evidence or as an exhibit for a hearing on the merits, pursuant to Sections 8 and 9 herein. Any member or employee of the commission or other person who, prior to a determination concerning probable cause, discloses information about any preliminary investigation, except as necessary to conduct the investigation, will be subject to an administrative enforcement action and may be deemed guilty of official misconduct. The unauthorized release of confidential information will be sufficient grounds for the termination of the employee or removal of the commissioner responsible for such release.

**Staff Note 10.** For ease of reference and accessibility, Staff has incorporated all page and formatting requirements into Section 6.

## **Section 6. Page Limitations and Format Requirements**

The Probable Cause Report and Hearing Brief will be limited to twenty-five pages, exclusive of any attachments. The Responses to the Probable Cause Report and Hearing Brief will be limited to twenty-five pages, exclusive of any attachments. Any rebuttal or reply will be limited to ten pages, exclusive of any attachments. All other filings will be limited to ten pages, exclusive of any attachments. A “page” means one side of an 8½ inch by eleven-inch page, with margins of at least one inch at the left, right, top and bottom of the page, typewritten and double-spaced in no smaller than twelve-point type. Each page and any attachments will be consecutively numbered.

**Staff Note 11.** In line with Staff’s recommendation for the Commission to delegate authority to the Executive Director to conduct probable cause conferences, Staff has significantly amended the regulations for Probable Cause Proceedings. Specific changes are highlighted.

## **Section 7. Probable Cause Proceedings**

**A. Complaint Closure.** The Director of Enforcement may recommend closure of a complaint if it falls within the Commission’s jurisdiction, but good cause exists to support closure rather than initiating probable cause proceedings. Good cause includes but is not limited to the Enforcement Director’s finding that the violation was de minimus; further prosecution of the complaint would not further the purpose of the law; or the respondent came into full compliance with a reporting obligation prior to the Enforcement Director’s initiating an

investigation. If the Executive Director concurs with the Director of Enforcement's recommendation, the Executive Director will notify the Commission in a monthly report pursuant to Section 4(D).

**Staff Note 12.** Staff included a provision for complaint closure in Section 7(A) recognizing that facts sometimes arise after an investigation has opened that obviate the need for further investigation, short of a finding of no probable cause. For example, sometimes City employees separate from City service and are guilty of minor infractions, such as having accepted a one-time gift not substantially exceeding the gift limit, such that using Commission resources to pursue the respondent across jurisdictions would not further the purpose of the Campaign and Governmental Conduct Code.

**B. Initiation of Probable Cause Proceedings.**

- 1. Delegation of Probable Cause Hearing Officer Duties.** The Commission delegates responsibility for conducting Probable Cause Conferences to the Executive Director, but, as described below, the Commission retains the authority to make probable cause findings. The Executive Director may not recommend a probable cause determination unless the respondent(s) has been provided an opportunity to respond to a Probable Cause Report and appear in person to make oral argument, if requested.
- 2. Probable Cause Report.** When the Director of Enforcement believes that probable cause exists to find a violation of law has occurred, the Director of Enforcement will prepare a written "Probable Cause Report" to commence probable cause proceedings. The Director of Enforcement must deliver a copy of the Probable Cause Report to each respondent, the Executive Director, and if applicable, a complainant who has alleged retaliation pursuant to Section 4.115 of the San Francisco Campaign & Governmental Conduct Code. The Probable Cause Report must include:

  - i. Identification of the alleged violations;
  - ii. A summary of the laws at issue;
  - iii. A statement of the evidence gathered through the investigation, including any exculpatory and mitigating information of which Staff has knowledge;
  - iv. Notification that the respondent has the right to respond in writing to the Probable Cause Report;
  - v. Notification that the respondent has the right to request a Probable Cause Conference, at which the respondent may be present in person and represented by legal counsel or another representative; and
  - vi. Any other relevant material or argument.
- 3. Whistleblower Complainants.** Complainants who have alleged retaliation pursuant to Section 4.115 of the San Francisco Campaign & Governmental Conduct Code may participate in probable cause proceedings regarding their complaint as identified in this section. Participation may include but is not limited to providing additional evidence to the Executive Director in response to the Director of Enforcement's Probable Cause Report or writing an independent response to the Director of Enforcement's Probable Cause Report. Complainants who would like to participate pursuant to this section must deliver a request to the Executive Director in writing within 10 calendar days of the issuance of Director of

Enforcement's Probable Cause Report. The Executive Director shall have discretion to define the scope of the complainant's participation in probable cause proceedings.

**Staff Note 13.** Staff received public comment requesting more opportunity for Whistleblower retaliation complainants to participate in the Commission's investigation and enforcement of their retaliation complaints under Campaign & Governmental Conduct Code Section 4.115. Staff considered the public's request and agrees that Whistleblower retaliation complainants are more like civil plaintiffs than any other complainant and should be afforded opportunity to participate in Staff's probable cause proceedings in a meaningful way. Staff has included the provision in Section 7(B)(3) to further this goal.

4. **Response to the Probable Cause Report.** Each respondent may submit a written Response to the Probable Cause Report. The Response may contain evidence, legal arguments, and any mitigating or exculpatory information. Responses must be delivered to the Executive Director and delivered to all other respondents listed in the probable cause report not later than 21 calendar days following service of the Probable Cause Report.
5. **Rebuttal.** The Director of Enforcement may submit evidence or argument in rebuttal to the response. When the Director of Enforcement submits a rebuttal, the Director of Enforcement shall deliver a copy to all respondents not later than 14 calendar days following the date the response was filed.
6. **Evidence.** The evidence recited in the Probable Cause Report, Response, and Rebuttal may rely on witness declarations, hearsay evidence (including declarations of investigators or others relating the statements of witnesses or concerning the examination of physical evidence), and any other relevant evidence.
7. **Requests for Extension of Time.** The Executive Director may extend the time limitations in this section for good cause. At any time prior to a determination of probable cause, the Executive Director may allow the submission of additional material. Parties seeking extensions of time to file pleadings or present additional materials must file a request with the Executive Director at least 5 calendar days prior to the original deadline.

**C. Probable Cause Conference.**

1. **Confidentiality.** Probable cause conferences shall be confidential and closed to the public unless the respondent requests, and all other respondents agree, that it be open to the public. After a determination regarding probable cause, the Probable Cause Report, the Response, and the Rebuttal will be confidential pursuant to section 5(D) of these regulations, unless the respondent requested that the probable cause hearing be public. If the respondent(s) agreed to a public hearing, then any evidence or argument produced at the public hearing shall be deemed public records.
2. **Requesting a Probable Cause Conference.** The Executive Director, Director of Enforcement, or any respondent(s) may request a Probable Cause Conference. The request will be served upon the Executive Director and all other parties no later than 21 calendar days after delivery of the Probable Cause Report unless the Executive Director extends the time for good cause. The Executive Director will set a time for the Probable Cause Conference, which

will be conducted informally. Complainants who have alleged retaliation pursuant to Section 4.115 of the San Francisco Campaign & Governmental Conduct Code may appear at a Probable Cause Conference, but they may not request a Probable Cause Conference.

### **3. Probable Cause Conference Procedures.**

- i. Representation.** The Probable Cause Conference will be an informal proceeding. The respondent may bring legal counsel or any other representative to assist them in the Probable Cause Conference.
- ii. Presentation of Evidence.** The Executive Director may allow witnesses to attend and participate in the Probable Cause Conference. A party making a request to present witness testimony at the Probable Cause Conference pursuant to this section must deliver a written request to the Executive Director and all parties within 7 calendar days of the Probable Cause Conference. When deciding whether to allow witness testimony, the Executive Director will consider the relevance of the witness's proposed testimony, whether the witness has a substantial interest in the proceedings, and whether fairness requires that the witness be allowed to participate.
- iii. Additional Information.** If the Executive Director requires additional information to determine whether there is probable cause, he or she may permit any party to submit additional evidence at the Probable Cause Conference or by a specified date following the Probable Cause Conference.
- iv. Recordings and Transcripts.** Every Probable Cause Conference will be audio recorded. The Director of Enforcement will retain the recording until the opportunity for legal challenge has been exhausted. The audio recording of the Probable Cause Conference will be provided to the respondent upon request. A respondent may ask that a certified court reporter attend and record the Probable Cause Conference at the respondent's cost. That respondent will provide copies of any transcript to the Executive Director and all other respondents. The cost of such a record will be borne by the respondent requesting the record.

### **D. Recommended Probable Cause Determination**

- 1. Standard.** The Executive Director may recommend a finding of probable cause to believe a violation has occurred if the evidence is sufficient to lead a person of ordinary caution and prudence to believe or entertain a strong suspicion that a respondent committed or caused a violation. A recommended finding of probable cause by the Executive Director does not constitute a finding that a violation has actually occurred.
- 2. Finding of Probable Cause.** If the Executive Director recommends a finding of probable cause, the finding must be in writing and must be based solely on the evidence and argument presented in the Probable Cause Report, Response, and Rebuttal, as well as any evidence or argument presented by the parties at the Probable Cause Conference. A recommended finding of probable cause must contain a summary of all evidence and arguments presented at the Probable Cause Conference, and the Executive Director's assessment of that evidence.



3. **Finding of No Probable Cause.** If the Executive Director determines that probable cause does not exist to believe a violation of law has occurred, the Executive Director will issue a finding of no probable cause in writing. The finding of no probable cause will provide clear and concise reasons supporting that determination.
4. **Timeframe.** The Executive Director will make a probable cause determination within 60 calendar days after the later of the date the Probable Cause Report was served, the date the Probable Cause Conference was held, or the date the last pleading was received if no Probable Cause Conference is held. The Executive Director will not make a Probable Cause Determination before the respondent's deadline to respond to the Probable Cause Report. The Executive Director will deliver the Probable Cause Determination to each respondent and the Director of Enforcement within 7 calendar days of making the determination.
5. **Commission Ratification of Executive Director's Probable Cause Determination.** Upon finalizing her recommended probable cause determination, the Executive Director will immediately inform the Commission of that determination. Thereafter, any member of the Commission may request review of the Executive Director's recommended probable cause determination by the full Commission in closed session at the next regularly scheduled Commission meeting. A Commissioner's request that a probable cause determination be calendared for consideration by the full Commission must be received by the Executive Director within 5 calendar days of the Executive Director's notification.

**Staff Note 14.** The Commission will ratify the Executive Director's recommended probable cause determination consistent with California's delegation principles.

- i. If any Commissioner requests review of the Executive Director's recommended probable cause determination, then the determination is not final until at least three members of the Commission agree to ratify it at the next regularly scheduled Commission meeting. The Commission must consider the Executive Director's recommendation in closed session and may hear argument from the Director of Enforcement or the respondent(s). The parties will not be given additional opportunity to provide written argument to the Commission.
  - ii. If no Commissioner requests review of the Executive Director's recommended probable cause determination, then the Commission has ratified the Executive Director's recommended probable cause determination, and the Executive Director will publish the formal Probable Cause Determination by delivering it to the parties and posting it to the Commission's website.
6. **Findings of No Probable Cause are Final.** The Commission's finding of no probable cause is a final decision and represents the end of the administrative process. No further action will be taken by the Commission to review or investigate the allegations contained in the complaint. If a complainant desires further review, the complainant must follow the procedures set forth in Section 1094.5(a) of the California Code of Civil Procedure governing judicial review of any final administrative order or decision.

- 7. Effect of Formal Written Advice.** The Executive Director will not make a finding of probable cause if s/he is presented with clear and convincing evidence that, prior to the alleged violation:
- i. The respondent had requested and obtained written formal advice from the Commission;
  - ii. The respondent, in requesting the opinion, disclosed truthfully all facts pertinent to the case;
  - iii. The Commission or its staff issued a written opinion with which both the District Attorney and City Attorney concurred;
  - iv. The respondent committed the acts or violations alleged in the complaint in good-faith reliance upon the written opinion of the Commission.

**Staff Note 15.** Section 8 has been reformatted and reorganized, but it is largely similar to Staff's previous regulations.

## **Section 8. Pre-Hearing Matters**

- A. Delegation to a Hearing Officer.** Upon approval by a majority of the members of the Commission, the Commission may delegate authority to preside over a hearing on the merits to a hearing officer. Any licensed attorney in the state of California or individual member of the Commission may serve as a hearing officer.
1. When an individual Commissioner or a hearing officer is assigned to hear and decide preliminary matters in advance of a hearing on the merits, he or she will make an actual determination. Procedural determinations may be reviewed by the Commission upon request by the Executive Director or a respondent.
  2. After presiding over a hearing on the merits, the hearing officer must submit a report and recommendation to the Commission for its consideration. The report and recommendation will contain proposed findings of fact and conclusions of law. Copies of the report and recommendation will be delivered to the Commission, Executive Director, and each respondent no later than 30 calendar days after the date the hearing is concluded. Thereafter, the Executive Director will calendar the matter for consideration at the next Commission meeting in open session.
- B. Scheduling and Notice of Hearing on Merits.** The Executive Director will schedule the hearing on the merits, and deliver written notice of the date, time, and location of the commencement of the hearing, to each respondent at least 30 calendar days prior to the commencement of the hearing. The notice will be in substantially the following form:

"You are hereby notified that a hearing will be held before the Ethics Commission (or name of hearing officer or assigned Commissioner) at \_\_\_ on the \_\_ day of \_\_, 20\_\_, at the hour of \_\_, at (location of \_\_\_\_\_), upon the charges made in the Finding of Probable Cause. You may be present at the hearing, may, but need not, be represented by counsel or another representative, may present any relevant

evidence, and will be given an opportunity to cross-examine all witnesses testifying against you. You may request the issuance of subpoenas to compel the attendance of witnesses and the production of books, documents or other things by applying to the Commission on or before (date).”

- C. **Hearing Officer.** Following the issuance of a Finding of Probable Cause by the Executive Director, the Commission will proceed with a hearing on the merits of the complaint. Unless otherwise decided by the Commission pursuant to Section 7(A), the Commission will sit as the hearing panel to hear the merits of the case.
- D. **Discovery.** The Executive Director and each respondent will be entitled to pre-hearing discovery in accordance with the provisions of the California Administrative Procedure Act, Government Code, Title 2, Division 3, Part 1, Chapter 5, section 11500 *et seq.*
  - 1. **Subpoenas.** The Commissioner or hearing officer assigned to decide preliminary matters will be authorized to provide for the issuance of subpoenas. The Executive Director and any respondent named in the Finding of Probable Cause may request the issuance of subpoenas for the attendance of witnesses and for the production of documents at the hearing on the merits. Requests for the issuance of subpoenas should be delivered no later than 20 calendar days prior to the commencement of a hearing on the merits. The request will be accompanied by a declaration specifying the name and address of the witnesses and setting forth the materiality of their testimony. If the request is for a document subpoena, it will be accompanied by a declaration which includes the following information: a specific description of the documents sought; an explanation of why the documents are necessary for the resolution of the complaint; and the name and address of the witness who has possession or control of the documents. Subpoenas may be issued upon approval of the Commission or the hearing officer.
- E. **Hearing Briefs.** The Executive Director will, and any respondent may, submit a hearing brief. The briefs will outline significant legal arguments and list evidence and witnesses to be presented at the hearing and may attach anticipated evidence, including documents and declarations. The briefs are not required to list anticipated rebuttal evidence or rebuttal witnesses. For page limitations and formatting requirements, see Section 6 of these regulations. Unless the Commission or outside hearing officer agrees to accept briefs by email, six copies of Staff’s Hearing Brief will be delivered to the Commission, assigned Commissioner, or outside hearing officer and all parties to the proceeding no later than 30 calendar days prior to the date the hearing on the merits commences. The respondent(s)’ responsive brief will be due no later than 15 calendar days prior to the date the hearing on the merits commences, and Staff’s rebuttal brief will be submitted no later than 5 calendar days prior to the date the hearing on the merits commences.
- F. **Preliminary Matters.** Any party may request formal consideration of preliminary matters by delivering to the assigned Commissioner, or hearing officer a motion setting forth relevant facts, law, and argument. Preliminary matters may include, but are not limited to, the following:
  - 1. Procedural matters;

2. Disqualification of any member of the Commission from participation in the hearing on the merits;
3. Requests for dismissal of any charges in the Probable Cause Determination because, even if the allegations set forth in the Determination are true, as a matter of law those charges do not state a violation of law as alleged;
4. Discovery motions; and
5. Any other matters not related to the truth or falsity of the factual allegations in the Probable Cause Determination.

A request for resolution of preliminary matters must be delivered to the Commission or hearing officer no later than 25 calendar days prior to the commencement of a hearing on the merits. Responses are due 20 calendar days prior to the hearing on the merits, and replies are due 15 calendar days prior to the hearing on the merits. When the request, response, or reply is delivered to the Commission or hearing officer, the requester must deliver copies of the request to the Executive Director and every other respondent(s).

- G. Recordings and Transcripts.** Every hearing on the merits will be recorded digitally. The Commission will retain the tapes until the opportunity for legal challenge has been exhausted. Copies of a tape will be available to the respondent upon request.
- H. Place of Delivery.** Whenever these regulations require delivery to the Commission, its members, or the Executive Director, delivery will be made at the Staff's office. Whenever these regulations require delivery to a respondent or his or her committee, delivery will be effective and sufficient if made by first class U.S. mail, personal delivery, or any other means of delivery agreed upon by the parties. In addition, the Commission may rely on the following addresses:
1. If the respondent is a City employee, to the address listed with the (Controller/ Payroll) as the employee's current personal? address.
  2. If the respondent is a former City employee, to the address listed with the City's retirement system.
  3. If the respondent is a current or former candidate or committee registered with the Ethics Commission, to the address provided to the Ethics Commission by that candidate or committee.
  4. If subsections (a) through (c) are not applicable, to an address reasonably calculated to give notice to and reach the respondent.

It is the responsibility of City employees, or candidates or committees who file reports with the Ethics Commission, to maintain accurate addresses with relevant City Departments. The Executive Director therefore may rely on those addresses in carrying out the objectives of the Commission.

- I. Voluntary Dismissal.** At any time after the Probable Cause Determination has been issued, the Executive Director may voluntarily dismiss all or part of an enforcement action for good cause by filing a Request for Voluntary Dismissal with the Commission. The Commission must consider the Request for Voluntary Dismissal at its next regularly scheduled Commission meeting in open session.

## Section 9. Hearing on the merits

### A. General Rules and Procedures.

1. **Commencement.** The Probable Cause Determination will be the charging document for the hearing on the merits.

**Staff Note 16.** Staff is changing the enforcement process to make the Probable Cause Determination the charging document for the hearing on the merits. Under the previous regulation, Staff was required to produce a separate, public accusation to initiate and administrative enforcement proceedings, which was largely duplicative.

2. **Public Hearing.** The hearing on the merits will be open to the public, provided that either the Executive Director or the respondent(s) may request that the Commission, assigned Commissioner or hearing officer exclude any parties' witnesses from being present during the hearing at which they are not providing testimony. Commissioners are prohibited, prior to a final determination on the merits of a complaint, from engaging in oral or written communications regarding the merits of a complaint or enforcement action with any person or entity. After a final determination on the merits of a complaint, Commissioners may discuss matters in the public record.
3. **Standard of Proof.** The Commission may determine that a respondent has committed a violation of law only if a person of ordinary caution and prudence would conclude, based on a preponderance of the evidence, that the respondent has committed or caused the violation.
4. **Rules of Evidence.** All evidence admissible in an administrative proceeding governed by the California Administrative Procedure Act will be admissible in a hearing on the merits. The Executive Director and each respondent will have the right to call and examine witnesses under oath or affirmation, to introduce exhibits, to cross-examine and impeach witnesses, and to rebut any evidence presented.
5. **Exhibits.** Where both parties stipulate to the admissibility of an exhibit, the parties will so advise the Commission in advance of the hearing. For all other exhibits, each party may move to admit a particular exhibit at the hearing, and the other party will have an opportunity to object prior to the ruling on the admission.
6. **Witnesses.** Witnesses will be examined by the parties as follows: direct examination, cross-examination, re-direct. After the parties have concluded their examination of a witness, Commissioners will have an opportunity to pose questions to the witness.
7. **Oral Argument.** At the hearing, the Executive Director and each respondent will be allowed oral argument. Each party will be allowed a minimum of 15 minutes to make their case, with three minutes for rebuttal. The Commission may extend any party's argument time.
8. **Oaths and Affirmations.** The Commission, and individual Commissioners and hearing officers assigned to conduct hearings, may administer oaths and affirmations.

## 9. Extensions of Time and Continuances.

- i. Whenever the Executive Director, a respondent, or a witness is required to complete an act or produce materials under this section, that party may request an extension of time. Requests for extensions of time may be made to the Commission Chair or the Commission Chair's designee. The requester must deliver the request to the Commission Chair or designee and provide a copy of the request to all other parties no later than 10 business days before the deadline to complete an act or produce materials. The Commission Chair or designee will have the discretion to consider untimely requests. The Commission Chair or designee will approve or deny the request within 5 business days of the submission of the request. The Commission Chair or designee may grant the request only upon a showing of good cause.
- ii. The Executive Director or any respondent may request the continuance of a hearing date. The requester must deliver the request to the Commission Chair or the individual Commissioner or hearing officer assigned to hold the hearing, and provide a copy of the request to all other parties no later than 10 business days before the date of the hearing. The Commission Chair or the individual Commissioner or hearing officer assigned to hold the hearing will have the discretion to consider untimely requests.
- iii. The Commission Chair or the individual Commissioner or hearing officer assigned to hold the hearing will approve or deny the request within 5 business days of the submission of the request. The Commission Chair or the individual Commissioner or hearing officer assigned to hold the hearing may grant the request only upon a showing of good cause.

- B. Finding of Violation.** If the Commission conducts the hearing on the merits, the Commission will determine, no later than 45 calendar days after the date the hearing is concluded, whether the respondent(s) has committed a violation of law. If the Commission assigns one of its members or an outside hearing officer to conduct the hearing on the merits, the assigned member or hearing officer will submit a report and recommendation to the Commission no later than 30 calendar days after the date the hearing is concluded. Thereafter, the Commission will determine, no later than 45 calendar days after the date the report and recommendation is delivered, whether the respondent(s) has committed a violation of law.

The votes of at least three Commissioners are required to find a violation of law. A finding of a violation will be supported by findings of fact and conclusions of law and must be based exclusively on the record of the proceedings before the Commission. Each Commissioner who participates in the decision will certify on the record that he or she personally heard the testimony (either in person or by listening to a tape or recording of the proceeding) and reviewed the evidence, or otherwise reviewed the entire record of the proceedings.

- C. Administrative Orders and Penalties.** The votes of at least three Commissioners are required to impose orders and penalties for a violation. The Commission may issue orders and penalties requiring the respondent(s) to:

1. Cease and desist the violation;
2. File any reports, statements, or other documents or information required by law;

3. Pay a monetary penalty to the general fund of the City in an amount permitted under the law that the Commission finds the respondent has violated, or, if the law does not specify the amount of the monetary penalty, in an amount up to five thousand dollars (\$5,000) for each violation, or three times the amount which the respondent failed to report properly or unlawfully contributed, expended, gave or received, whichever is greater. Unless otherwise ordered by the Commission, any penalties imposed by the Commission must be paid in full by the respondent within 90 calendar days of the Commission's decision; and
4. Any other relief the Commission deems appropriate and within its authority under Charter section C3.699-13.

**D. Penalty Factors.** When deciding on an order and penalties, the Commission will consider all the relevant circumstances surrounding the case, including but not limited to:

1. The severity of the violation;
2. The presence or absence of any intention to conceal, deceive, or mislead;
3. Whether the violation was willful or negligent;
4. Whether the violation was an isolated incident or part of a pattern;
5. Whether the respondent has a prior record of violations of law;
6. The degree to which the respondent cooperated with the investigation and demonstrated a willingness to remedy any violations; and
7. The respondent's ability to pay will be considered a mitigating factor if the respondent provides documentation to the Director of Enforcement of such inability, which must include three years' worth of income tax returns and six months' worth of bank records or accounting statements, at a minimum.

**Staff Note 17.** Section 9(D)(7) is new. Staff is adopting an ability to pay process for the assessment of penalties to further the purposes of enforcement: to effectively deter violations of the law through appropriate punishment. To do that, administrative penalties should not force a respondent into bankruptcy, but rather should be commensurate with their ability to pay.

**E. Finding of No Violation.** If the Commission determines that there is insufficient evidence to establish that the respondent has committed a violation of law, or if the Commission determines that there is sufficient evidence to establish that the respondent has not committed a violation of law, the Commission will publicly announce this fact. No further action will be taken by the Commission to review or investigate the allegations contained in the complaint. If a complainant desires further review, the complainant must follow the procedures set forth in Section 1094.5(a) of the California Code of Civil Procedure governing judicial review of any final administrative order or decision.

**F. Default Orders.** If the Executive Director followed the notice of hearing procedures identified in these Regulations, and the respondent(s) failed to appear before the Commission for a hearing on any matter, then the Commission may enter an order adverse to the interests of the respondent(s) who failed to appear, including but not limited to, a Default Order for injunctive relief and administrative penalties after a hearing on the merits. The Executive Director bears the burden of proving that the respondent(s) was properly served in accordance with these regulations. A default order is a final administrative order or decision. If a party desires further review, he must follow the procedures set forth in Section 1094.5(a) of the California Code of Civil Procedure governing judicial review of any final administrative order or decision.

**Staff Note 18.** The Commission’s current Enforcement Regulations do not currently provide for a default process. Staff has largely adopted the Fair Political Practice Commission’s default processes. [See FPPC Regulation 1836.11.](#)

## Section 10. Referrals from the Sunshine Ordinance Task Force.

**Staff Note 19.** Staff is recommending fully repealing the existing Enforcement Regulations for Handling Violations of the Sunshine Ordinance and incorporating the principals set forth in those regulations here. This provision identifies the two circumstances where the Commission has jurisdiction to consider whether a respondent(s) has violated the Sunshine Ordinance and bifurcates the Commission’s procedures in two, just as the existing regulations do. The primary substantive difference is that Staff is recommending that the Commission defer to the Sunshine Ordinance Task Force’s findings of fact—where appropriate—when the Task Force refers one of its own Orders of Determination to the Commission for enforcement.

- A. Willful Violations by Elected Officials and Department Heads.** The willful failure of any elected official, department head, or other managerial city employee to discharge any duties imposed by the Sunshine Ordinance, the Brown Act or the Public Records Act will be deemed official misconduct. *See* San Fran. Admin. Code § 67.34. Complaints involving allegations of willful violations of this ordinance, the Brown Act or the Public Records Act by elected officials or department heads of the City and County of San Francisco will be handled by the Ethics Commission. *Id.* As required by Section 67.34 of the Sunshine Ordinance, the Ethics Commission will handle the investigation of, and potential enforcement against, credible allegations of willful violations by elected officials and department heads pursuant to the regulations set forth herein. All other complaints alleging violations of the Sunshine Ordinance will be forwarded to the Sunshine Ordinance Task Force for its consideration.
- B. Enforcement after Hearing.** If a City officer or employee fails to comply with an order of the Sunshine Ordinance Task Force, then the Sunshine Ordinance Task Force may refer the matter to the Ethics Commission for enforcement pursuant to its authority under San Francisco Charter Section C3.699-13 and San Fran. Admin. Code § 67.35(d).
- 1. Show Cause Hearing.** After receipt of a referral to enforce an order of the Sunshine Ordinance Task Force, the Commission will schedule a Show Cause Hearing on the matter at the next regularly scheduled Commission meeting. The Show Cause Hearing will be open to the public.
- i. Standard of Proof.** The respondent(s) will have the burden to prove that he or she did not commit a violation of the Sunshine Ordinance, as documented by the Sunshine Ordinance Task Force’s Order of Determination and referral.
- ii. Hearing Procedures.** Upon request, a representative of the Sunshine Ordinance Task Force, complainant, and respondent will each have five minutes to present their argument to the Commission during the Show Cause Hearing. Witnesses may speak for



three minutes, unless the Commission agrees to extend their testimony. Formal rules of evidence do not apply to hearings on referrals to enforce an order of the Sunshine Ordinance Task Force.

- iii. **Standard of Review.** Where appropriate, the Commission will defer to the findings of fact set forth in the Sunshine Ordinance Task Force’s Order of Determination; however, any party may bring evidence to present or witnesses to testify on their behalf at a Show Cause Hearing. The Commission will review the Sunshine Ordinance Task Force’s conclusions of law independently, or de novo.
- iv. **Deliberations and Findings.** The Commission will deliberate in public. Public comment on the matter will be allowed at each hearing, in accordance with the Sunshine Ordinance and the Brown Act. To determine that a violation of the Sunshine Ordinance occurred, the Commission must conclude that, based on a preponderance of the evidence, the Respondent committed a violation of the Sunshine Ordinance. The Commission will consider all the relevant circumstances surrounding the case. The finding that a Respondent committed a violation of the Sunshine Ordinance will be supported by findings of fact and conclusions of law and will be based on the entire record of the proceedings.

**Staff Note 20.** In Section 12, Staff is incorporating its Late Filing Fees waiver policy into the Enforcement Regulations, where it is readily accessible to the public.

## Section 11. Late Filing Fees

- A. **Weekend Filing Deadlines.** Except as identified in subsection (B), filings that are due to the Commission on a Saturday, Sunday, or City-recognized holiday but filed no later than the next business day will not be assessed late filing fees. Any late filing fees that would have accrued on a weekend or holiday deadline will be waived pursuant to applicable authority under the relevant ordinance as a matter of enforcement discretion. The Ethics Commission’s electronic filing system, will recognize the next business day as the filing deadline where applicable.
  - 1. Late filing fees will not be waived for Late Contribution Reports (Form 497) or Late Independent Expenditure Reports (496) due the weekend before an election.
  - 2. All electronic filings must be submitted to the Commission’s electronic filing system by 11:59 p.m. Pacific Time on the deadline. All paper filings must be received in paper format or by facsimile by 5:00 p.m. on the deadline.
  - 3. City-recognized holidays include: New Year’s Day, Dr. Martin Luther King, Jr. Day, President’s Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veteran’s Day, Thanksgiving Day and the Day After, Christmas Day.
- B. **Waiver Requests.** Persons owing late filing fees may respond to the Commission’s initial, non-specific written notice by requesting a reduction or waiver of the fees in whole or in part. The request must be in writing, explain why the Commission should consider the late filer’s filing non-willful, relate why enforcement of the late filing fee provision would not further

enforcement of the applicable law, identify good cause to justify the requested reduction or waiver in late filing fees, provide adequate documentation to demonstrate the facts underlying the request for good cause, and be signed by the responsible party.

1. **Deadline.** The waiver request must be received by the Commission within 14 calendar days of the date on the Commission's initial non-specific written notice. The Commission will presumptively deny requests for reduction or waiver of late filing fees received past this deadline.
2. **Good Cause.** The following factors will presumptively qualify as "good cause" and are therefore grounds for a waiver:
  - i. **Incapacitation for Medical Reasons.** Adequate documentation consists of a signed statement by a board-certified physician, psychologist, psychotherapist, or chiropractor identifying the filer, the nature of the filer's incapacitation, and the date(s) thereof. The statement must be on the medical provider's letterhead.
  - ii. **Death.** Adequate documentation consists of a copy of the filer's death certificate, published death notice, or obituary.
  - iii. **Act of God.** The loss or unavailability of records due to a fire, flood, theft, earthquake or similar reason. Adequate documentation will consist of a police officer, fire or insurance report indicating the date of the occurrence and the extent of the loss or damage.
  - iv. **Other Unique Reasons.** These include compelling reasons beyond the filer's control.
3. The following do not constitute "good cause" and therefore are not grounds for a waiver: first-time filer, not receiving notice of filing requirements, not being available to sign forms, not sending filing to proper official, not knowing where to get forms, not having complete information by filing deadline, not picking up mail, secretarial error.

## Section 12. Stipulated Orders

- A. **Stipulated Orders.** Settlement saves time and resources for both the Commission and the respondent(s). At any time, the Executive Director may enter negotiations with a respondent(s) to resolve the factual and legal allegations in a complaint by way of a stipulated order. The stipulated order will set forth the pertinent facts and may include an agreement as to anything that could be ordered by the Commission under its authority pursuant to Charter section C3.699-13. The stipulated order will also explicitly state that:
  1. The proposed stipulated order is subject to approval by the Commission;
  2. The respondent knowingly and voluntarily waives any and all procedural rights under the law and these Regulations;
  3. The respondent understands and acknowledges that the stipulation is not binding on any other law enforcement agency, and does not preclude the Commission or its staff from cooperating with or assisting any other government agency with regard to the matter, or any other matter related to it;
  4. The respondent agrees that in the event the Commission refuses to approve the proposed stipulation, it will become null and void; and

5. In the event the Commission rejects the proposed stipulation and a full evidentiary hearing before the Commission becomes necessary, no member of the Commission will be disqualified because of prior consideration of the stipulation.

**B. Non-Admissible.** The details and supporting documentation for unsuccessful settlement negotiations are non-admissible in the subsequent administrative enforcement action.

**C. Installment Plans.** As a general rule, the Executive Director will not accept offers to pay assessed administrative penalties in installments without proof of inability to pay as set forth in Section 9(E). Upon proof of inability to pay, the Executive Director may consider accepting an offer to pay assessed penalties in installments, but installment agreements must require full payment before the expiration of 6 months.

**D. Assessing Administrative Penalties.** When assessing administrative penalties for the purposes of settlement negotiation, Staff will follow the rules set forth in Section 9(E) of these regulations.

**Staff Note 21.** Staff is proposing two new provisions—Section 13(C) and (D) regarding stipulated orders. In response to written public comment, Staff is incorporating its penalty assessment matrix from Section 9(E), Hearing on the Merits, for consistency and transparency in how Staff assesses penalties when negotiating a settlement. In addition, Staff is formalizing its policy against the use of installment plans to pay down administrative penalties. The Commission should not provide zero-interest payment plans to respondent(s) when ability to pay is a factor in its assessment.

**E. Consent Calendar.** Immediately after the Executive Director enters a stipulated order with a respondent, the Executive Director will inform the Commission of the proposed stipulation. Thereafter, any member of the Commission may request that the stipulated order be reviewed in public session by the full panel of the Commission during its next meeting. Requests for consideration before the full panel of the Commission must be received by the Executive Director by 12:00 p.m. on the fifth calendar day prior to the Commission meeting. If no member requests review in public session by the full panel of the Commission, then the stipulated order will be placed on the public agenda for the next Commission meeting in a section titled “Consent Calendar.” Members of the public will be permitted to comment on any stipulated order listed on the Consent Calendar.

**Staff Note 22.** In Section 13(E), Staff is incorporating the FPPC’s Consent Calendar concept into its Enforcement Regulations. All proposed stipulated orders will now appear on a public Consent Calendar unless a Commissioner requests a hearing on the stipulation. That hearing will take place in public session to promote transparency and accountability in the Commission’s decision making.

**F. Commission Approval Required.** Stipulated orders must be approved by the Commission and, upon approval, must be announced publicly. The stipulated order will have the full force of a final order of the Commission.

**Staff Note 23.** In Section 14, Staff is incorporating the changes recommended in the Anti-Corruption and Accountability Ordinance of 2017 regarding the running of the statute of limitations and tolling the statute in the case of intentional concealment, fraud, or deceit. In proposing this change, Staff hopes to provide clarity for both complainants and respondents who may have been confused by the Commission’s previous standard. The Commission’s previous standard provided that the statute of limitations ran “within four years of the date of events which form the basis of the complaint, or the date that the events constituting the basis of the complaint were discovered by the Ethics Commission, whichever is later.” See Enforcement Regulations § XIII(F)(2).

### **Section 13. Statute of Limitations**

- A. Statute of Limitations.** Unless otherwise stated in City or State law, for statute of limitations purposes, an action or proceeding for administrative penalties is brought or commenced by the Executive Director on the date the Director of Enforcement delivers the Probable Cause Report. If there is no statute of limitations for violations of the law allegedly violated, the Probable Cause Report must be delivered within four years of the date of the alleged violation of law.
  
- B. Tolling the Statute of Limitations.** A Probable Cause Report may not be served to commence administrative enforcement proceedings more than four years after the date of an alleged violation. This four-year period is tolled:
  - 1. If the respondent(s) engaged in concealment or deceit, for the period of concealment or deceit. Concealment or deceit may occur as part of an alleged violation, such as with money laundering or the falsification of records, or may occur as conduct following a complaint.
  
  - 2. If the respondent(s) fails to comply with a subpoena or subpoena duces tecum, from the date the compliance was originally required until the date compliance is achieved.

### **Section 14. Severability**

If any provision of these Regulations, or the application thereof to any person or circumstance, is held invalid, the validity of the remainder of the Regulations and the applicability of such provisions to other persons and circumstances will not be affected thereby.

THE SUTTON LAW FIRM

September 27, 2017

VIA EMAIL & U.S. MAIL

Jessica Blome, Esq.  
San Francisco Ethics Commission  
25 Van Ness Ave., Ste. 220  
San Francisco, CA 94102

RE: Proposed Revisions to Ethics Commission's Enforcement Regulations

Dear Jessica:

Thank you for giving us the opportunity to provide input into the proposed changes to the San Francisco Ethics Commission's enforcement regulations at the interested persons meeting last week. This letter summarizes the comments which we made at the meeting, and includes some additional comments. We also want to acknowledge your efforts at updating the regulations and making them consistent with some best practices from other jurisdictions.

1. Settlement negotiation process. Although the vast majority of enforcement matters are resolved via mutually agreed-upon settlements between the Commission and respondents, the regulations focus almost exclusively on the process for probable cause reports and administrative hearings. Section XIV lists the boilerplate provisions which must be included in stipulations, but the regulations do not otherwise set forth the policies and procedures which Commission staff should follow while negotiating settlements with respondents. You stated during the interested persons meeting that one of your goals is to consolidate the enforcement regulations so that a respondent in an enforcement matter may go to one source to learn about the process. If a respondent were to look at the current or proposed enforcement regulations, however, he or she would have no idea that the matter is most likely going to be resolved via settlement negotiations and a stipulation, and would instead believe that the matter would be resolved at a public hearing.

We therefore recommend that you consider adding a section to the regulations about settlement negotiations. Topics covered in such a section could include:

- applying the standards governing fines and orders in section XII (c)(2) to

stipulation amounts;

- the amount, terms and stipulation language must be agreed upon by both the Commission and the respondent;
- settlement saves time and resources for both the Commission and the respondent;
- the Commission's final consideration is limited to the facts and law outlined in the stipulation;
- non-admission of settlement negotiation details into the probable cause and hearing process.

2. "Forfeiture." Several provisions of the City's campaign law state that committees must "forfeit" sums to the City when the amount violates City law – for example, when a candidate committee accepts a contribution from a corporation; when a committee deposits a check without having the contributor's occupation and employer information; when a committee accepts a contribution which exceeds the \$500 contribution limit; etc. These forfeiture provisions were drafted based on the assumption that the underlying violation would be obvious and indisputable from the face of a campaign report; in our experience, however, violations are rarely clear, and the Commission has in the past issued letters demanding forfeiture based on what turn out to be inaccurate facts. For example, the Commission has demanded forfeiture from a committee based on the mistaken belief that contributions from an individual and an entity were aggregated and therefore subject to a single limit; when it believed that a contributor's occupation and employer were vague and/or inaccurate but the contributor had used that information on the remit envelope; when a committee treasurer had mistakenly typed "Inc." after a contributor's name; etc.

In the past, the Commission has typically not processed forfeiture demands through its regular enforcement regulations, even though these demands are necessarily predicated on the Commission's conclusion that a committee violated the law. For example, the forfeiture letters – which may be incorrect – are public documents, and it is unclear whether committees may challenge forfeiture demands through the probable cause/hearing process. We therefore suggest that the regulations clarify that forfeiture demands are enforcement matters subject to the same confidentiality and due process protections as other enforcement investigations.

3. Penalty provision. The law allows the Commission to levy penalties or

negotiate settlements up to \$5,000 per violation or three times the amount not properly reported. We believe that the treble damages provision should be reserved for matters which involve intentional or otherwise egregious conduct. To apply this calculation to unintentional or less serious violations would be unfair to respondents and would implicate their Eighth Amendment rights against “excessive fines.” For example, if a lobbyist who has filed her monthly reports on a timely basis for several years inadvertently forgets to file one report – perhaps because she was on vacation on the reporting deadline, believed that her assistant had filed the report, etc. – we do not believe that it would be appropriate for the maximum potential liability for such an oversight to be three times the amount of the fees listed on the missed report. Similarly, we do not believe that it would be appropriate for the maximum penalty to be three times the cost of a mailer when a candidate inadvertently fails to file one Mass Mailing Report for one piece of mail, when the costs of the mailer are fully reported on the candidate’s regular campaign report, all of the candidate’s Mass Mailing Reports were filed on a timely basis, etc. The law was not intended to so harshly penalize individuals and entities who make inadvertent mistakes.

4. Statute of limitations. The current regulations state that the statute of limitations for Ethics Commission enforcement matters is four years from the date of the violation or four years from the date that the Ethics Commission “discovers” the violation, whichever is later. (Section XIII (F).) We do not believe that it is appropriate to base the statute of limitations on when the Ethics Commission learns about a potential violation, unless the respondent has taken some action which conceals the violation from the Commission. As currently drafted, the enforcement regulations could be read to allow the Commission to pursue and enforce a matter for something that happened 5, 10 or even 15 years earlier, simply because someone filed a complaint about the conduct at this time.

Such an open-ended statute of limitations obviously raises serious due process concerns. We therefore suggest that you consider amending the regulations to include the language in state law which governs FPPC enforcement matters, which would allow the Commission to toll the statute of limitations if the respondent has “fraudulently concealed” his or her actions. (See Cal. Govt. Code section 91000.5(b).)

We note that similar, open-ended language appears in the statute of limitations section of the City’s lobbying law. (S.F. Camp. & Govt. Conduct Code section 2.150(b).) The statute of limitations in the City’s campaign law does not contain any language about when the Commission “discovers” a violation but states that the statute ends when the Commission opens an investigation (section 1.168(c)(3)), which effectively writes any time limit out of the law. The clearest statute of limitation seems to be found in the City’s ethics

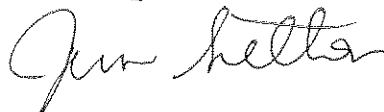
Jessica Blome, Esq.  
September 27, 2017  
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law. (Section 3.242(e).) Given these inconsistencies, you may want the enforcement regulations to govern enforcement matters under all three laws, perhaps by adding “Notwithstanding any other provision in law, the probable cause report must be delivered within four years of the date of events which form the basis of the complaint, unless the person alleged to have violated the law has engaged in the fraudulent concealment of his or her acts or identity, in which the four-year period shall be tolled for the period of concealment.”

\* \* \*

Thank you very much for your consideration of these suggestions. We look forward to reviewing the revised regulations and discussing them with the Commission at its October 23<sup>rd</sup> meeting.

Sincerely,



James R. Sutton

JRS/jaa  
#1000.01



## Agenda Item 8, Attachment 3

**From:** LARRY BUSH  
**To:** [Blome, Jessica \(ETH\)](#); [Pelham, Leeann \(ETH\)](#)  
**Subject:** Friends Ethics response on Enforcement IP discussion points  
**Date:** Sunday, September 17, 2017 4:45:51 PM

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The proposed Enforcement Regulation changes are in line with recommendations from the Civil Grand Juries of 2010 and 2014. The chairs of the Ethics investigation committees for those two reports are members of Friends of Ethics, as is the Foreperson of the 2014 Civil Grand Jury and two other members of that Civil Grand Jury ethics investigation committees.

These are our suggestions for the Commission's consideration

Thank you.  
Larry Bush for Friends of Ethics

**1. The person who filed the complaint should be given an opportunity to comment or add information before the Commission or Executive Director makes a determination.**

The lack of an opportunity for the complainant to discuss the complaint with the Commission has been a point of contention. Dr. Kerr was given no chance to make comments about his whistleblower complaint before the Commission met in closed session and dismissed it. His lawsuit afterwards was successful, which should have embarrassed the Commission. At a minimum, the complainant should be informed at the same time as the plaintiff that the Commission has set a meeting to consider acting on the complaint, including when. This opportunity to comment can be in closed session.

**2. The SF penalty should be authorized to be greater than (not less than) the state penalty.**

For example, late filing of Form 700 has a \$10 a day penalty to a max of \$100, which provides no deterrent. That's only one example. Most campaign penalties are \$5,000 or three times the amount involved. In some cases, SF would be better served with higher penalties, particularly when top officials are involved.

**3. Regulations should specify that any Ethics finding that is referred to an official or a Department must have a response from that referral within 30 days or some limited time and include an explanation about the action/inaction taken. Ethics is required to refer disciplinary or other action to an appointing authority (in case of misconduct by an appointee) or to a Department (in cases of wrongful action including whistleblower complaints).**

When Ethics called for the removal of a Library Commissioner for Sunshine violations, the mayor never responded to Ethics even after two letters over a

period of a year asking for a response. In other cases, Departmental actions have been minimal with no explanation (or even announcement). This recommendation doesn't change the authority for action, but does require that Ethics determination be given a serious response that is public.

**4. Whistleblower retaliation case determinations should be directly communicated to the Board of Supervisors, City Attorney, and Mayor, regardless of the outcome.**

Currently there is no requirement that Ethics provide the outcome to the officials who have a role to play. A serious retaliation case might result in the Board deciding on action regarding a department's budget (or at least not awarding the Director a merit increase), the Controller may find the basis for a debarment or action against an official, and so forth. The Board President has had Ethics referral for reform of the Whistleblower Act for nearly two years with action still pending other than a series of "meet and confer" sessions. By sending case results, Ethics will give a higher profile to this important employee protection.

**5. It is mandatory for Ethics to investigate cases where it also has jurisdiction when criminal or civil charges are brought.**

Currently a judge has dropped one of the felony charges against a former Human Rights Commissioner for bribery, suggesting that there was an effort to launder contributions but that this was not the crime charged. There is no indication that anyone will now undertake an investigation that focuses on that alleged violation. This is only one example and there have been others. Ethics has not acted with investigations and findings of other money laundering cases. Consider that Ethics alone has the authority to suspend a lobbyist or consultant involved in significant violations. In cases where such a regulated individual is involved, Ethics should invoke its own authority.

**6. The regulations should require a translator or signer in investigations where it is warranted.**

In the past, Ethics has failed to determine if translation is needed. In one case, the person facing disciplinary charges had to provide the translation herself for witnesses on her behalf, and no commissioner had any idea whether the translation was accurate. Without a regulation making this a requirement, it is overlooked to the detriment of the process.

**7. The Executive Director must inform the Commission in cases when the FPPC or other enforcement agency suggests a joint enforcement action.**

The proposed regulations give the Executive Director authority to make a determination, but do not speak to the past practice of referring cases involving violations that are state as well as local to the FPPC. There is at least one very high profile example of the FPPC contacting the Ethics Commission staff with a proposal for a joint enforcement action based on differing state and local violations, and the Commission was not informed that the suggestion was made. It should be clear that the Executive Director must inform the Commission of any

proposed joint action, and that the Commission and not the Executive Director alone may decide on whether to act on the suggestion.