



ETHICS COMMISSION

CITY AND COUNTY OF SAN FRANCISCO

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LEEANN PELHAM
EXECUTIVE DIRECTOR

Date: July 16, 2018
To: Members of the Ethics Commission
From: Pat Ford, Senior Policy Analyst
Re: **Agenda Item 8 – Introduction of Proposed Opinion and Advice Regulations**

Summary: This memo introduces a proposed set of regulations to clarify the procedures for providing opinions and advice to the regulated community.

Action Requested: That the Commission discuss the proposed regulations and continue the regulations for discussion and possible action at a future meeting.

I. Background

The San Francisco City Charter provides that any person may request that the Ethics Commission provide a written opinion or informal advice regarding that person's duties under provisions of the Charter or the Municipal Code (the "Code") relating to campaign finance, conflicts of interest, lobbying or governmental ethics.¹ The purpose of allowing for such requests is to ensure that anyone whose activities are regulated by the Code has the opportunity to learn how the Code applies to his or her specific future conduct, and therefore to be empowered to conform their conduct to the requirements of the Code. This feature of the Commission's duties helps to ensure compliance with the Code and to promote transparency and fairness in both its administration and enforcement of the laws.

There are two separate modes through which the Commission or Staff can provide answers to questions about how the Code applies to the specific conduct of an individual: opinions and advice. The processes for requesting either an opinion or advice are substantially similar; a requestor must state the material facts, the questions presented, and whether he or she seeks an opinion from the Commission or advice from Staff. The differences between opinions and advice lie in (i) the process for issuance and (ii) the effect on the requestor.

A. Opinions

An opinion is a formal declaration by the Commission as to how provisions of the Charter or the Code apply to a specific person under a specific set of facts. Opinions can be adopted only by a majority vote of the Ethics Commission. If a person has been the subject of an opinion adopted by the Commission and conformed their conduct to what the opinion deemed to be lawful conduct, then, in any subsequent enforcement action, the Executive Director will not

¹ CHARTER OF THE CITY AND COUNTY OF SAN FRANCISCO § C3.699-12(a)–(b).

make a finding of probable cause that such conduct violates the Code. The person needs to have truthfully provided all material facts when requesting the opinion.²

B. Advice

Informal advice, or simply *advice*, is analysis by Commission Staff as to how provisions of the Charter or the Code *likely* apply to a specific set of facts. The Commission does not participate in providing informal advice, and informal advice does not grant immunity from an enforcement proceeding to any person. If a person who requests and receives informal advice from Commission Staff conforms their conduct with the facts and recommendations stated therein, the informal advice may be relevant in a subsequent enforcement proceeding before the Commission as a mitigating circumstance.³ The extent to which prior informal advice will serve as a mitigating circumstance will depend on factors including whether the requestor provided all the material facts when requesting advice.

II. Regulations

Staff recommends that the Commission review and discuss the regulations attached here as Attachment 1 and continue the regulations to a future meeting for possible action. These Regulations would provide important guidance to the regulated community and public about:

1. The process for requesting an opinion or advice;
2. What kinds of questions are proper for opinions and advice;
3. How Staff and, in the case of an opinion, the Commission must handle requests; and
4. The legal effects that opinions and advice have on the requestor.

The Regulations would further the purposes of the Code by facilitating clear opinion and advice procedures and, by extension, better compliance with the laws under the Commission's jurisdiction. This would be accomplished through a transparent and standardized process for issuing opinions and advice. Although there currently are standard practices and procedures used by Staff for handling requests for opinions and advice, the Regulations would formalize these procedures and make them more widely transparent to anyone considering requesting an opinion or advice. Having clear, standardized procedures would also promote the provision of consistent and timely opinions and advice. Each request would necessarily be subject to the same protocol, helping requestors to understand how their request will be handled and the likely timing for receiving a response.

Most fundamentally, the Regulations would promote greater understanding of the Code by clarifying how individuals seek guidance from the Commission and what legal effect that guidance has.

Staff invites any questions or comments regarding the attached proposed regulations.

² See *Id.* at § C3.699-12(a); SAN FRANCISCO ETHICS COMMISSION, ENFORCEMENT REGULATIONS § 7(D)(8) (referring to opinions as “formal written advice” and stating that the Executive Director will not find probable cause for an enforcement action relating to conduct that has been deemed lawful in formal written advice issued to the respondent).

³ See *Id.* at § C3.699-12(b).