



ETHICS COMMISSION

CITY AND COUNTY OF SAN FRANCISCO

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LEEANN PELHAM
EXECUTIVE DIRECTOR

Date: October 15, 2018

To: Members of the Ethics Commission

From: Pat Ford, Senior Policy Analyst

Re: Agenda Item 5 – Discussion and Possible Action on Proposed Ethics
Commission Opinion and Advice Regulations

Summary: This memo presents a proposed set of regulations (Attachment 1) to clarify the procedures for providing opinions and advice to the regulated community. The content of this memo was originally presented at the Commission's regularly scheduled September meeting. The proposed regulations attached as Attachment 1 have been amended in response to questions and feedback from the Commission at the September meeting.

Action Requested: That the Commission discuss the proposed regulations and consider approving them.

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.

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

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 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**

A. General Purpose

Staff recommends that the Commission review and discuss the regulations attached here as Attachment 1 and consider approving them so that they can promptly go into effect. 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

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).

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.

B. Stakeholder Engagement and Amendments to Regulations

Following the Commission's July meeting, at which Staff first presented a draft of the proposed regulations to the Commission for discussion purposes only, Policy has undertaken a program of stakeholder engagement to foster a constructive public discussion of the proposed regulations and to solicit proposals for amendments.

Policy facilitated interested persons meetings on July 31st and August 1st at which the public was invited to comment upon the proposed regulations that were presented at the July Commission meeting. Additionally, Policy engaged multiple stakeholders in phone conversations to provide for additional opportunity to hear detailed feedback and proposals about the draft regulations. Lastly, Policy has collected written comment from stakeholders pertaining to the proposed regulations. Written comments that were provided in relation to this agenda item are attached to this memo as Attachment 2.

Policy heard many constructive comments during the program of stakeholder engagement. In response, Policy adopted a small number of amendments that will improve the overall efficacy and transparency of the Commission's opinion and advice functions. These amendments, which are reflected in the version of the regulations attached here as Attachment 1, are:

- To clarify that when an authorized representative requests an opinion or advice on behalf of another person, the representative must provide the name of the person who has authorized the representative to make the request on his or her behalf;
- To clarify that when an authorized representative requests an opinion or advice on behalf of another person, the question must pertain to the duties under the law of the person who has authorized the representative to make the request on his or her behalf;
- To require that, after Staff have determined whether a request for an opinion or advice is a proper request, Staff must communicate that conclusion to the requestor within two days of the determination (the version presented in July required the conclusion to be communicated "as soon as practicable");
- To clarify that the Executive Director shall not find probable cause for pursuing an enforcement action with regard to conduct that was previously deemed lawful in an opinion requested by the respondent and adopted by the Commission (Whereas the version of the regulations presented in July only referred to this effect of an opinion in cases where both the District Attorney and City Attorney concur in the opinion [thereby conferring civil and criminal immunity to the requestor], the current draft clarifies that, regardless of concurrence by other offices,

Commission opinions will confer immunity to the requestor from the Commission's administrative enforcement power.); and

- To clarify that if the Commission rescinds a previously adopted opinion, conduct that occurred after the opinion was adopted but before it was rescinded will still receive the benefit of the opinion.

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



ETHICS COMMISSION

REGULATIONS FOR THE PROVISION OF OPINIONS AND ADVICE

Regulation 699-12-1: Definitions

For purposes of these Regulations, the following definitions shall apply:

- A. "City" means the City and County of San Francisco.
- B. "Commission" means the Ethics Commission, a body of five appointed members.
- C. "Day" means any day other than a Saturday, Sunday, City holiday, or a day on which the Commission office is closed for business, unless otherwise specifically indicated. If a deadline falls on a weekend or City holiday, the deadline shall be extended to the next working day.
- D. "Executive Director" means the Executive Director of the Commission or the Executive Director's designee.
- E. "Good Cause" means providing adequate or substantial grounds or reason to take a certain action, or to fail to take an action prescribed by law.
- F. "Requestor" means a person requesting an opinion or advice of the Ethics Commission or the requestor's authorized representative.
- G. "Staff" means the employees of the Ethics Commission.

Regulation 699-12(a)-1: Requesting an Opinion

- (A) A request for an opinion must be submitted to the Executive Director in writing, either hard copy or electronically, and must clearly state all of the following to be a complete and proper request:
 - (i) That an opinion of the Commission is being requested.
 - (ii) The name, title or position, and email address, mailing address, or telephone number of both the person or persons requesting the opinion and, when the requestor is an

- authorized representative, the person or persons for whom the opinion is being requested.
- (iii) If the requestor is an authorized representative, a specific statement that such authorization has been made.
 - (iv) All material facts, stated as clearly, concisely, and completely as possible.
 - (v) The question or questions based on the material facts.
- (B) A request for an opinion is not a complete and proper request if it does any of the following:
- (i) Does not pertain to the requestor's duties, or, when the requestor is an authorized representative, does not pertain to the duties of the person represented, under provisions of the Charter or any ordinance relating to campaign finance, conflicts of interest, lobbying or governmental ethics.
 - (ii) Is not made in writing.
 - (iii) Does not clearly state that an opinion of the Commission is being requested.
 - (iv) Asks a general question of interpretation or policy.
 - (v) Depends on facts that are not provided by the requestor.
 - (vi) Asks about a hypothetical situation.
 - (vii) Asks about the duties or activities of someone other than the requestor who has not authorized such request.
 - (viii) Pertains to past duties or activities.
 - (ix) Omits factual information relevant to the duty or activity that is the subject of the request.
 - (x) Is substantially similar to a previously adopted opinion.
 - (xi) Is expressly addressed in the Charter, an ordinance, or Commission regulations.
 - (xii) Is outside the Commission's jurisdiction.
- (C) The requestor may submit supporting materials, including memoranda, briefs, arguments, or other relevant material regarding the request for an opinion, provided that the supporting material is provided no later than twenty days prior to the meeting at which the Commission will consider the request.
- (D) A requestor may withdraw a request for an opinion at any time prior to the Commission considering the proposed opinion. The withdrawal must be submitted in writing to the Executive Director.

Regulation 699-12(a)-2: Process for Reviewing Requests and Considering and Adopting Opinions.

- (A) Only requests for an opinion that are complete and proper will be accepted for purposes of issuing an opinion. Upon receiving a request for an opinion, the Executive Director or his or her designee must determine whether the request constitutes a complete and proper request. The determination shall be transmitted to the requestor within two days after the determination is made. If the request does not constitute a complete and proper request, the Executive Director or Staff shall notify the requestor of the specific deficiencies in the request.

- (B) Following the determination that an opinion request is complete and proper pursuant to Regulation 699-12(a)-1, the Commission shall consider the draft opinion in open session at the next regularly scheduled meeting that occurs at least forty-five days after that determination is made. If good cause exists to extend the deadline for considering the opinion, the Executive Director will so notify the Commission.
- (C) Upon receipt of a complete and proper request, the Executive Director or other Staff shall prepare a draft opinion that addresses the questions posed in the request. The Commission shall review the draft opinion and may adopt any recommendations of Staff. The Commission may adopt an opinion upon a majority vote of its members. If the Commission fails to adopt a draft opinion, the Commission must do one of the following:
 - (i) Deny the request for an opinion and state the reasons for the denial,
 - (ii) Request that the Executive Director amend the draft opinion in accordance with the direction of the Commission and schedule the revised opinion to be considered at the Commission's next regularly scheduled meeting.
- (D) If the Commission adopts an opinion, the Executive Director shall, within three days of adoption, transmit the opinion to the City Attorney and District Attorney, provided that the Executive Director can extend this time for good cause.
- (E) As set forth in the Charter, within ten days of receipt of the proposed opinion, the City Attorney and District Attorney shall advise the Commission whether they concur in the proposed opinion. If either the City Attorney or District Attorney does not concur with the proposed opinion, he or she shall inform the Commission in writing concerning the basis for disagreement.

Regulation 699-12(a)-3: Effect of Opinions

The Executive Director will not make a finding of probable cause if she or he is presented with clear and convincing evidence that, prior to the alleged violation, the respondent was the subject of an Opinion adopted by the Commission in which the conduct in question was deemed lawful and all facts pertinent to the opinion were truthfully disclosed by the respondent.

Regulation 699-12(a)-4: Rescinding Opinions.

An opinion may be rescinded by the Commission at a public meeting of the Commission by a majority vote of its members. The Commission must state for the public record the reasons for rescinding the opinion. However, if an opinion is rescinded, the opinion shall continue to have the effect stated in Regulation 699-12(a)-3 with regard to conduct that occurred after the opinion was adopted by the Commission and concurred in by both the District Attorney and City Attorney and prior to the opinion being rescinded.

Regulation 699-12(b)-1: Requesting Informal Advice.

- (A) A request for informal advice must clearly state all of the following in order to be a complete and proper request:
 - (i) That informal advice is being requested.
 - (ii) The name, title or position, email address, and mailing address or telephone number of the person or persons requesting the advice. If the advice is requested by the authorized representative of several similarly situated persons, the identifying and contact information of at least one represented person must be included.
 - (iii) If the requestor is an authorized representative, a specific statement that such authorization has been made.
 - (iv) All material facts, stated as clearly, concisely, and completely as possible.
 - (v) The question or questions based on the material facts.
- (B) A request for informal advice is not a complete and proper request if it does any of the following:
 - (i) Does not pertain to the requestor's duties, or, when the requestor is an authorized representative, does not pertain to the duties of the person represented, under provisions of the Charter or any ordinance relating to campaign finance, conflicts of interest, lobbying or governmental ethics.
 - (ii) Asks a general question of interpretation or policy.
 - (iii) Depends on facts that are not provided by the requestor.
 - (iv) Asks about a hypothetical situation that does not pertain to the requestor's actual conduct or planned future conduct.
 - (v) Asks about the duties or activities of someone other than the requestor who has not authorized such request.
 - (vi) Pertains to past duties or activities.
 - (vii) Omits factual information relevant to the duty or activity that is the subject of the request.
 - (viii) Is substantially similar to a previously adopted opinion or published informal advice.
 - (ix) Is expressly addressed in the Charter, an ordinance, or Commission regulations.
 - (x) Is outside the Commission's jurisdiction.
 - (xi) Is not made in writing, if the requestor desires the advice to be delivered in writing.

Regulation 699-12(a)-2: Reviewing Requests and Issuing Informal Advice.

- (A) Only requests for informal advice that are complete and proper will be accepted for purposes of issuing informal advice. Upon receiving a request, Staff must determine whether it constitutes a complete and proper request for informal advice. Staff's determination shall be transmitted to a requestor within two days after the determination is made. If the request does not constitute a complete and proper request, Staff shall notify the requestor of the specific deficiencies in the request.

- (B) Staff must provide the advice to the requestor no later than 30 days after a complete and proper request for informal advice is received. Staff may extend the response deadline if there is good cause for the delay.

Regulation 699-12(a)-3: Effect of Informal Advice

- (A) If a person who is the subject of informal advice issued by Staff conforms his or her 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.
- (B) Informal advice does not constitute a Commission opinion and is not a formal declaration of Commission policy.



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October 10, 2018

Via Email

Ms. LeeAnn Pelham
Mr. Patrick Ford
San Francisco Ethics Commission
25 Van Ness Avenue, Suite 220
San Francisco, CA 94102

Re: Proposed Advice and Opinions Regulations

Dear Ms. Pelham & Mr. Ford:

Pursuant to your request for comments regarding the proposed advice and opinions regulations, please find my comments below. Please incorporate these comments into the public record.

Regulation 699-12(a)-2: Process for Reviewing Requests and Considering and Adopting Opinions. Subparagraph (A) provides that upon receiving a request for an opinion, the Executive Director or designee will determine whether the request constitutes a complete and proper request and transmit that determination to the requestor within two days after the determination is made. Since the two day timeframe applies after the determination is made, the requestor has no idea how long it will take for Commission staff to determine whether or not the request is complete and proper. Since such determinations will generally be made from a facial review of the written request, that process should not take an inordinate amount of time, and a specific timeframe for that determination and notice to the requestor should be based on receipt of the request.

Under state law and regulations issued by the Fair Political Practices Commission (the "FPPC"), within 14 days after receiving a request for an opinion, the Executive Director must notify the requestor in writing whether or not to grant or deny the opinion request. Cal. Gov't Code Sec. 83114(a); 2 Cal. Code Regs. Sec. 18320(d)-(e). This approach gives the requestor a time certain for a response once the request

has been submitted to the FPPC. A similar time certain process should apply to opinion requests submitted to the Commission.

Regulation 699-12(a)-4: Rescinding Opinions. According to the draft regulation, when an opinion is rescinded, the opinion will continue to have the effect stated in Regulation 699-12(a)-3 with regard to conduct that occurred after the opinion was adopted by the Commission and concurred in by both the District Attorney and City Attorney and prior to the rescission of the opinion.

Since Regulation 699-12(a)-3, Effect of Opinions, does not depend on the concurrence of the District Attorney and City Attorney, the effect of an opinion which will be rescinded should similarly not be dependent upon any concurrence of the District Attorney or City Attorney. As a result, an opinion which is rescinded by the Commission should continue to have the effect stated in Regulation 699-12(a)-3 with regard to conduct that occurred after the opinion was adopted by the Commission and prior to the opinion being rescinded.

Regulation 699-12(b)-1: Requesting Informal Advice. As currently drafted, this regulation will prevent any person, including an attorney, from seeking informal advice regarding hypothetical situations or general questions about the interpretation or policies regarding the City's political laws. This will significantly and negatively impact not only attorneys but campaign treasurers and consultants who seek to understand these laws in order to properly advise clients regarding the same.

This position is contrary to Section 1.168(d) of the Campaign Finance Reform Act which specifically provides that "Any person may request advice from the Ethics Commission or City Attorney with respect to any provision of this Chapter."

This position is also contrary to a similar provision in the FPPC regulations. In Regulation 18329(c), informal assistance may be requested, in part, by (1) any person whose duties under the Act are in question, or by that person's authorized representative, or (2) **any person with a duty to advise other persons relating to their duties or actions under the Act.** The FPPC thus recognizes the value of providing informal advice to attorneys and other members of the regulated community regarding various laws under its jurisdiction.

The Commission should adopt the approach used by the FPPC which includes three methods for providing opinions and advice: formal opinions, formal written advice, and informal assistance. Based on the foregoing, this regulation should be retitled "Requesting Formal Written Advice".

Regulation 699-12(b)-2¹: Reviewing Requests and Issuing Informal Advice. First, this section should be retitled “Reviewing Requests and Issuing Formal Written Advice.”

Second, similar to Regulation 699-12(a)-2, a specific timeframe should be provided for the Executive Director to notify a requestor whether or not the request for formal written advice is complete and proper. The timeframe for the Executive Director’s notification should be based on a specific number of days after receipt of the request instead of a specific number of days after a determination has been made about whether or not the request is complete and proper.

Regulation 699-12(b)-3²: Effect of Informal Advice. This section should be retitled “Effect of Informal Written Advice.”

Subparagraph (A) provides that if a person who is the subject of informal advice issued by 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.

Such conformity should not be a mitigating circumstance but rather a complete defense in any enforcement proceeding initiated by the Commission against the person who received the advice, and evidence of good faith conduct in any other civil or criminal proceeding. See Cal. Gov’t Code Sec. 83114(b).

Subparagraph (C) should be added to indicate that informal written advice may serve as guidance for others with similar facts and circumstances. See 2 Cal. Code Regs. Sec. 18329(b)(7).

Regulation 699-12(c): Informal Assistance. Similar to FPPC Regulation 18329(c), Informal Assistance, a third option should be added to the regulations, including new sections on requesting informal assistance, reviewing requests and issuing informal assistance, and the effect of informal assistance. These regulations should include, in part, the following provisions:

1. Informal assistance may be requested by (a) a person whose duties under the law are in question, (b) anyone representing the person whose duties under the law are in question, or (c) an attorney, campaign treasurer, campaign consultant, or any other person who has a duty to advise other persons relating to their duties or actions under the law.

¹ This regulation appears to be incorrectly numbered 699-12(a)-2 instead of 699-12(b)-2.

² This regulation appears to be incorrectly numbered 699-12(a)-3 instead of 699-12(b)-3.

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2. A request for informal assistance does not require the identification of specific parties by the requestor.
3. A request for informal assistance may include a request for an interpretation of a law, regulation, or policy under the jurisdiction of the Ethics Commission.
4. A request for informal assistance may include how the law, a regulation or policy applies to a hypothetical situation.
5. Informal assistance may include oral or written assistance.

Thank you in advance for your consideration of the above recommendations.

Very truly yours,



Anita D. Stearns Mayo