



ETHICS COMMISSION

CITY AND COUNTY OF SAN FRANCISCO

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Date: June 24, 2019
To: Members of the Ethics Commission
From: Jeff Pierce, Director of Enforcement & Legal Affairs
LeeAnn Pelham, Executive Director
Subject: **AGENDA ITEM 10: Enforcement Process Improvements Review**

Summary: This report provides background on the operations of the Enforcement Division and discusses various process improvements that are being implemented by Staff to increase the efficiency and effectiveness of the Commission's enforcement program.

Action Requested: No action is required. This report is provided for informational purposes but has been agendized to allow for the Commission to take action should the Commission wish to provide its general policy direction regarding Enforcement Division activities or priorities at its June meeting.

At the May 29, 2019 regular meeting of the Ethics Commission in its discussion of the Staff's monthly Enforcement report, Chair Chiu requested that Staff provide a further overview of the Commission's current enforcement caseload at the June meeting, along with approaches for best using limited resources to promote the Commission's enforcement mandate, including prioritization of different matters based on their impact and importance.¹ This report provides background on the operations of the Enforcement Division in response to that request and describes various process improvements that Staff are implementing to increase the efficiency and effectiveness of the Commission's enforcement program.

Background: Authority and Mandate

In establishing the Ethics Commission in 1993 through passage of Proposition K, San Francisco voters provided that the Ethics Commission is responsible for "the impartial and effective administration and implementation of the provisions of this charter, statutes and ordinances concerning campaign finance, lobbying, conflicts of interest and governmental ethics." S.F. Charter § [C3.699-10](#). The Charter, in concert with the Campaign & Governmental Conduct

¹ N.B. (August 12, 2019): At the request of the Chair, this item was continued from the June meeting until the July meeting to ensure that newly appointed Commissioner Gray could participate in the discussion.

Code, provides that the Commission has authority to investigate and administratively enforce alleged violations of campaign finance, lobbying, conflicts of interest, governmental ethics, and whistleblower retaliation. *Id.* § [C3.699-13](#). In furtherance of the Commission’s duties, S.F. Charter [section 15.100](#) provides, in part, that “[t]he Commission may subpoena witnesses, compel their attendance and testimony, administer oaths and affirmations, take evidence and require by subpoena the production of any books, papers, records or other items material to the performance of the Commission’s duties or exercise of its powers.” The Commission’s enforcement mandate is further addressed as a finding of the City’s Campaign Finance Reform Ordinance, which provides, in part, that “[i]t is the purpose and intent of the People of the City and County of San Francisco in enacting this Chapter to . . . provide full and fair enforcement of all the provisions in this Chapter.” S.F. Campaign & Governmental Conduct Code § [1.100\(b\)\(1\)](#).

Operationally, responsibility to investigate alleged violations and pursue appropriate resolution of those matters based on the facts and the law is assigned to the Enforcement Division.

Overview of Current Enforcement Caseload

The number, average age, and type of matters in preliminary review or opened as investigations has been reported regularly at Commission meetings since April 2016. Regular public disclosure of that data has been designed to provide the opportunity for the Commission and the public to have better transparency into the nature and pace of work conducted by Staff in pursuing the Commission’s administrative enforcement mandate.

Figure 1 below shows the general types of the 88 matters that were under investigation as of the end of May, 2019. Of the 88 matters then under investigation, just over half, or 51 percent, were related to alleged violations of campaign finance and reporting provisions of the law. Another 40 percent were ethics-related matters, including eight percent that involved alleged misuse of position to engage in retaliation against a whistleblower. The remaining nine percent were matters alleging violations of the City’s lobbying laws.

Figure 2 provides a further breakdown of the types of alleged violations under investigation within the areas of campaigns, ethics, and lobbying in those 88 cases.

Figure 1

General Type of 88 Matters in Open Investigation as of May 23, 2019

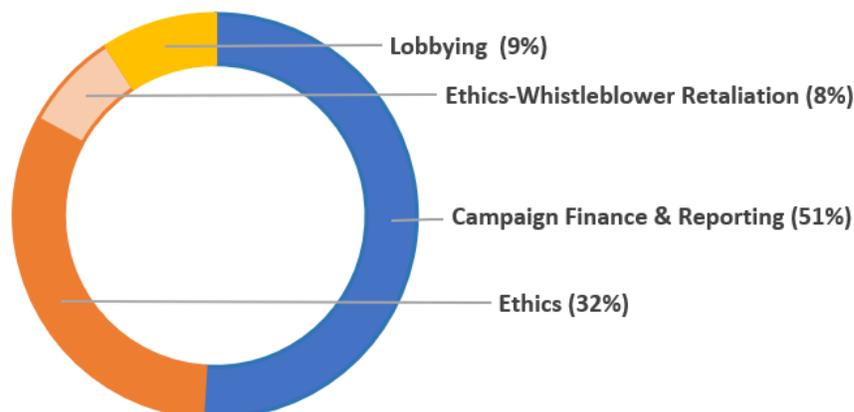


Figure 2

CAMPAIGNS		
Campaign Finance - Contribution Limits	5	11%
Campaign Finance - Prohibited Contributions	6	13%
Campaign Finance - Improper Use of Campaign Funds	5	11%
Campaign Reporting - Filing & Disclosure	17	38%
Campaign Reporting - Advertising Disclaimers	8	18%
Campaign Reporting - Campaign Consultant	4	9%
	45	100%
ETHICS		
Conflicts of Interest	7	20%
Gift Restrictions	4	11%
Misuse of Office - Incompatible Activities	14	40%
Misuse of Office - Political Activity	2	6%
Misuse of Office - Private Gain	1	3%
Misuse of Office - Whistleblower Retaliation	7	20%
	35	100%
LOBBYING		
Prohibited Activities	3	38%
Registration/Reporting	5	63%
	8	100%

By way of additional analysis, of the 88 investigations that were open at the end of May, 2019, 17 matters (or 19 percent) were in the stipulation or Probable Cause Report drafting phase, 66 matters (or 75 percent) were in the ongoing investigation phase, and five matters (or six percent) were on hold pending the action of another agency.

Background on Recent Enforcement Practices

Historically, a majority of the Ethics Commission’s enforcement matters have originated by complaint, which the Commission receives from members of the public, candidates and committees, whistleblowers, and referral from peer agencies. The Commission may likewise conduct investigations on its own initiative, S.F. Charter § [C3.699-13\(a\)](#), or based on referrals of completed audits from the Audit Division. As an agency with authority to pursue administrative enforcement for violations of the laws within its jurisdiction, the Ethics Commission pursues enforcement based on strict liability. The neutral, fair, and consistent application of strict liability provides accountability for compliance with the laws in a manner than promotes a political culture in which no person is above the law or subject to selective enforcement.

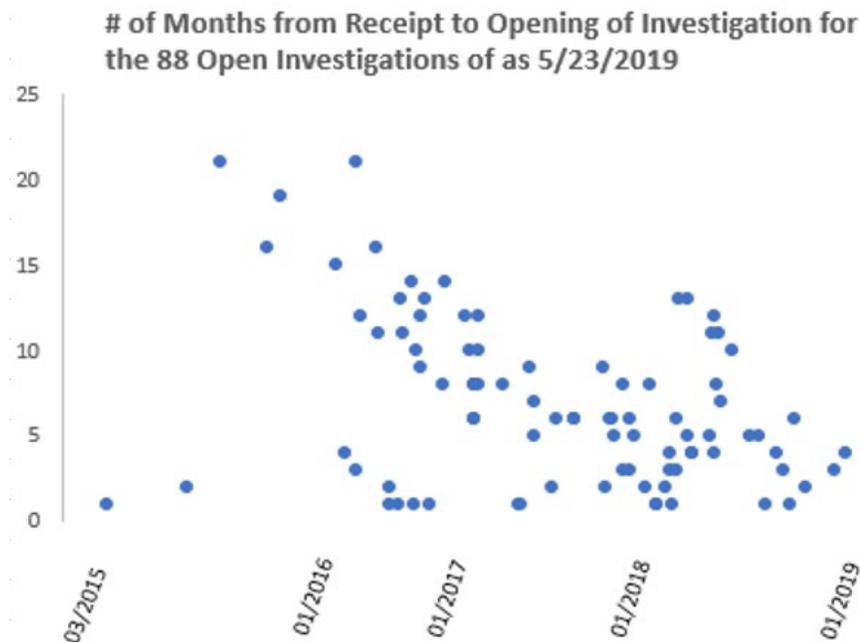
Over each of the past three fiscal years, the Division has received an average of 140 complaints, the vast majority originating from outside the Commission. Also over each of the past three fiscal years, the Division has opened an average of 45 investigations, or nearly one a week. Over the last twelve months, the Division has had an average of 86 investigations open at any given time. While caseloads are unpredictable and regularly in flux, the number of complaints received tends to increase during elections.

The Division’s current enforcement caseload—with a preliminary review docket of 45 matters averaging nearly nine months to process and an open investigations docket of more than 90 matters averaging

14.5 months to resolve—has resulted from a combination of factors. One is that within the last fiscal three years the Division had no investigative staff for a duration of roughly six months, a period from which the Division continues to recover. Another factor is that the restructured Enforcement Division has endeavored for the last two years to open investigations into all meritorious complaints alleging a violation of law within the Commission’s jurisdiction. A third contributing factor is that the Division has endeavored to handle those complaints in roughly the order in which they arrived (first in, first out), including those matters held over from the period of understaffing.

Against this backdrop, it is noteworthy that the average number of months from the date a complaint was received to the opening of an investigation has shown improvement. Among the 88 investigations open as of the end of May, 2019, for example, the average number of months between the date the complaint was received to the opening of a formal investigation continues to show a downward trend.

Figure 3



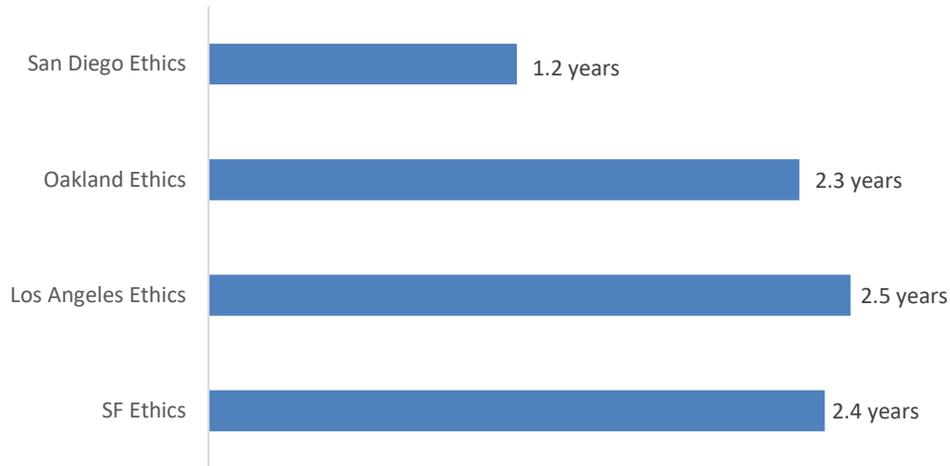
More specifically, of those 88 complaints reflected above, on average it took the Enforcement Division twelve months to open the investigation for complaints received prior to August 2016 (before the Commission hired the prior Enforcement Director), six months to open the investigation for complaints received between August 2016 and March 2018 (during the tenure of the Commission’s prior Enforcement Director), seven months to open the investigation for complaints received between March and August 2018 (when the Commission had an Acting Enforcement Director) and three months to open the investigation for complaints received from September 2018 to present (after the Commission permanently filled the position of Enforcement Director).

Apart from these accelerating trends, because of the size of its investigative docket and the approach of handling complaints on a roughly first in, first out basis, investigators are working more than optimally on cases with older conduct at issue. To inform its process improvement review, Staff analyzed the period of time between the alleged conduct and stipulation resolutions for its own caseload as well as

those at peer agencies in Los Angeles, San Diego, and Oakland over the past three fiscal years. Based on published stipulations of those agencies, a comparison of average time between conduct and a ratified stipulation is shown in Figure 4, below.

Figure 4

Average Time Between Conduct and Ratified Stipulated Settlement Resolving the Matter at Four Local Ethics Agencies, Fiscal Years 2017, 2018 and 2019 to date

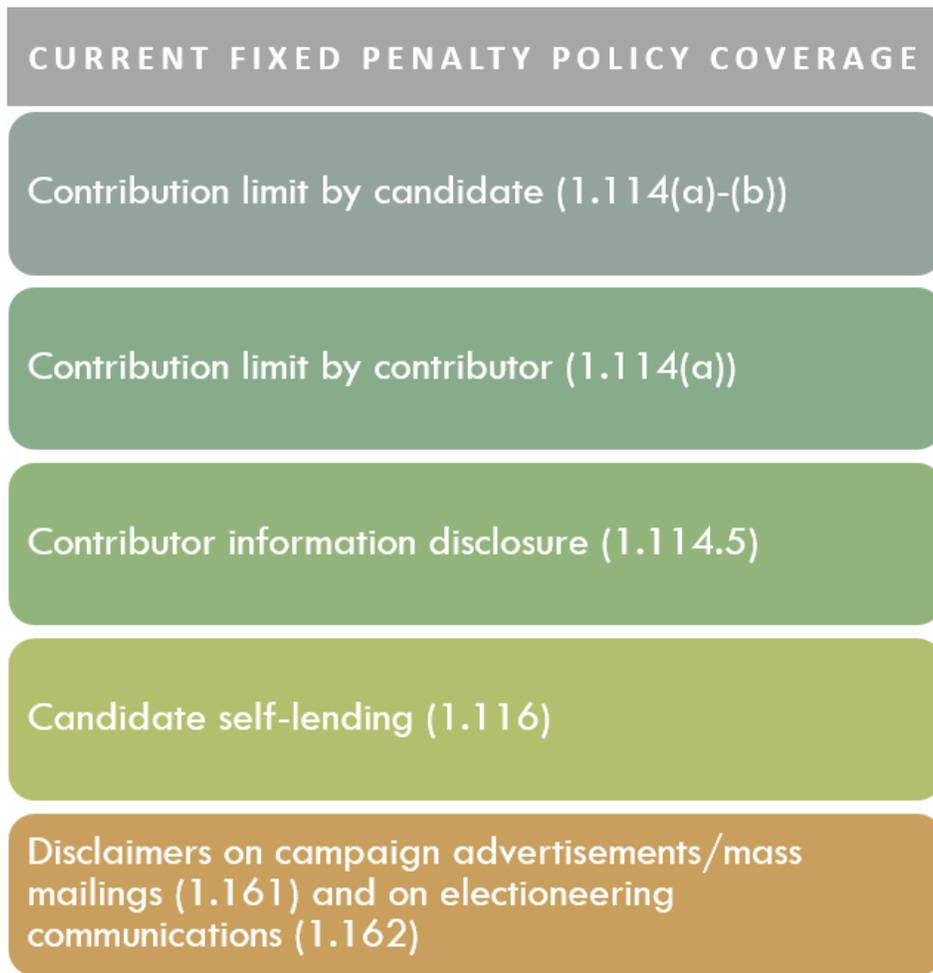


The Charter provides that the Ethics Commission “shall investigate” alleged violations within its jurisdiction whenever it determines there is “sufficient cause” to do so. S.F. Charter § [C3.699-13\(a\)](#). The Charter does not, however, define the meaning of “sufficient cause.” Over the past three years as the Commission’s programs and operations have been in transition, the prosecutorial discretion and program practices exercised by the Enforcement Division have been guided by the twin goals of (1) ensuring all meritorious complaints are addressed and (2) strengthening investigative and enforcement structures, regulations, and practices to ensure more standardization, better consistency, fairness, thoroughness, and due process. For example, in developing a body of shared understanding and consistency for case treatment, the Division prepares analyses to help ensure a matter has not been dismissed or closed on an improper basis, that it has not overlooked relevant facts or law, and that it has not failed to investigate facts that may have substantiated a theory of liability. These processes have gained traction, yet as the caseload has grown and resources have remained relatively level, regularly evaluating how best to allocate finite resources going forward is critical to continuous improvement.

Of those complaints the Commission has received, some may be characterized as more administrative in nature, meaning those that solely or chiefly concern alleged violations of filing, disclaimer, or recordkeeping requirements. Others involve alleged violations of matters that are relatively greater in scale, scope, or complexity and involve, for example, alleged misuse of public position, conflicts of interest, or other prohibited activities by officials, campaign contributors, or lobbyists, or patterns of such activities. While the more administrative cases can often require relatively less time or fewer staff resources to bring to a resolution with a respondent, broader scope investigations often require substantially more resources to conduct the investigation, gather and assess evidence, and negotiate a stipulated settlement.

One approach the Commission has taken in the past is by identifying a subset of matters that are subject to a Fixed Penalty Policy. Adopted in 2013, that Policy is designed to provide consistency, predictability, and fairness in the resolution of identified matters, while also preserving investigative resources for more complex or severe kinds of violations that typically require more resources to bring to resolution. Stipulations secured through the Fixed Penalty Policy arise from a more streamlined resolution of violations of several provisions in the Campaign Finance Reform Ordinance that are generally discovered during a review of campaign finance statements or other disclosure statements and typically require little to no investigation or other evidence to show that the violation occurred. Figure 5 lists the provisions that are covered by the existing Fixed Fine Penalty Policy.

Figure 5



Process Improvements in Enforcement Practices

Having assessed its recent enforcement approaches and practices and noting the Commission's expressed interest in also ensuring appropriate process improvements to allow the Commission's finite enforcement resources to be leveraged most effectively, the Enforcement Division has identified and is implementing a series of steps.

Case Prioritization

To inform its review of operational methods and processes, the Division consulted counterparts at the Los Angeles City Ethics Commission, the San Diego Ethics Commission, and the Oakland Public Ethics Commission. Similar to San Francisco, most also handle complaints in their rough order and allocate resources according to the complexity of a matter and any urgency arising chiefly from a statute of limitations. Based on those and further internal discussions, the Enforcement Division has identified the following criteria for assessing the relative prioritization of cases:

- Severity of the alleged violation
- Impact of a Commission decision
- Timing of alleged misconduct
- Availability of a meaningful remedy
- Probability of substantiating allegations
- Availability of enforcement resources

To clarify, by severity of the alleged violation, the Division may evaluate the type and scale of the alleged misconduct. In general, those matters involving allegations of public corruption, misuse of position by public officials, self-dealing, conflicts of interest, whistleblower retaliation, and other breaches of the public trust will be assigned a higher relative prioritization by Staff than, for example, cases involving solely reporting or recordkeeping omissions or deficiencies.

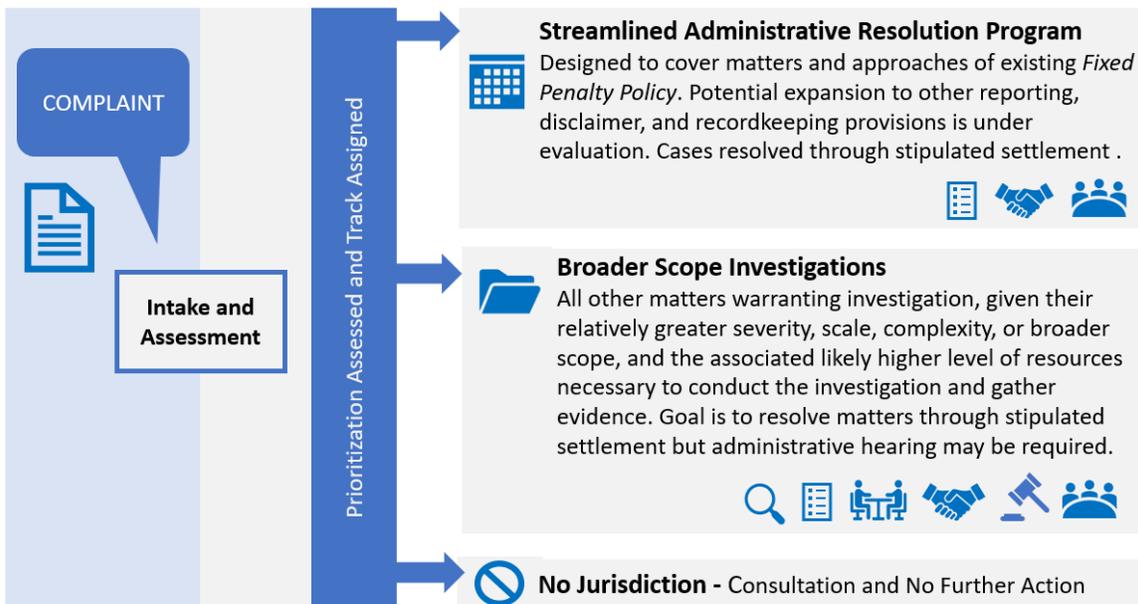
By impact of a Commission decision, the Division may evaluate the scope of the alleged misconduct (that is to say, not only as to a given respondent but more broadly across the regulated community), the probable deterrent value of a public resolution, and the public interest in securing an enforcement outcome. The Commission's Enforcement Regulations identify additional factors that may be used in evaluating the impact of a Commission decision. Enforcement Regulation section 7(A) provides that an open investigation may be closed in the interest of justice (that is to say, irrespective of the evidence), including if the violation was *de minimis* or further prosecution of the complaint would not further the purpose of the law. The Division may apply these considerations, for example, where no independent witnesses can be identified to corroborate the allegations, where another City agency in performing a concurrent investigation appropriately absorbs the allegations under the Commission's investigation, or the respondent is unlikely to engage again in the alleged misconduct, such as by virtue of significantly changed circumstances.

With these factors in place to help guide and focus enforcement resources as may be needed, the Division will plan to allocate resources accordingly toward the most pressing and significant matters. As with any exercise of prosecutorial discretion, of course, matters that present considerations other than these criteria may also warrant heightened focus and resources if they present circumstances that indicate a breadth in their scope or complexity, such as a pattern of alleged violations or of ongoing conduct that runs counter to the law.

Streamlined Administrative Resolution Program

The Division also proposes to expand coverage of the Commission's Fixed Penalty Policy, whereby it could handle additional reporting, disclaimer, and recordkeeping matters through streamlined procedures and thereby allow further realignment of investigative resources for broader scope

investigations of greater severity, complexity, or breadth. Such additional matters might include not only additional violations of the Campaign Finance Reform Ordinance but also conduct governed by the Campaign Consultant, Lobbyist and Government Ethics Ordinances. The Division continues to develop a proposal to bring to the Commission for its consideration. Building from the existing Policy, new processes would be put in place with the goal of placing additional matters on track for streamlined administrative resolution so that cases suitable for stipulated settlements through that approach can be resolved as timely and efficiently as possible.



No Jurisdiction: Consultation and No Further Action

Lastly, as a matter of course the Enforcement Division has changed how it handles those informal complaints that allege violations that clearly fall outside the Commission’s jurisdiction. In contrast to “sworn complaints,” which the Enforcement Director “must process and evaluate,” Enf. Reg. § 3(A)(2), Enforcement Regulation section 3(B)(2) provides the Enforcement Director with 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 violation(s).” Enf. Reg. § 3(B)(2). As a more recently adopted standard practice, the Enforcement Director now interfaces directly with those complainants for consultation about the Commission’s enforcement authority and where they might better pursue their complaints, and the Division subsequently takes no further action on such matters.

Conclusion

Staff welcomes the Commission’s discussion at the June meeting and will be happy to answer any questions and receive the Commission’s feedback. Additionally, following its completion of its assessment of how to expand the Fixed Penalty Policy, Staff will prepare a report with any resulting recommendations for the Commission’s consideration at an upcoming Commission meeting.