



ETHICS COMMISSION

CITY AND COUNTY OF SAN FRANCISCO

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Date: September 16, 2019

To: Members of the Ethics Commission

From: Jeff Pierce, Director of Enforcement & Legal Affairs

Subject: **AGENDA ITEM 5: Preliminary Outline for Revisions of Commission's Fixed Penalty Policy**

Summary: This memorandum sets forth a preliminary outline for the process Staff proposes to follow in revising the Commission's Fixed Penalty Policy.

Action Requested: No action is required by the Commission, as this item is for informational purposes only and proposed draft language to update the Fixed Penalty Policy is planned for a subsequent Commission meeting pursuant to the process outlined below.

Introduction

At the August 16, 2019 Commission Meeting following its discussion of [Agenda Item 10](#) regarding various process improvements being implemented by Staff to increase the efficiency and effectiveness of the Commission's enforcement program, Chair Chiu requested that the Enforcement Division develop a plan to revise the Commission's existing [Fixed Penalty Policy](#) (the "Policy," see Attachment 1), which the Commission adopted in July 2013. The Chair requested that Enforcement Staff present to the Commission an overview of the process it might follow and the issues it might consider in working to revise the existing Policy. Because the Policy provides that it remains effective until modified or rescinded by a majority vote of the Commission, the Commission's participation in this process will be essential.

Existing Fixed Penalty Policy

The existing Fixed Penalty Policy is governed by the principle that certain specified violations that are generally obvious on the face of campaign finance statements or other documentation, and that typically require little to no investigation to establish liability, are appropriate for resolution through a fixed penalty schedule. While each respondent remains free to exercise his or her rights under the Enforcement Regulations to move through the hearing process for any alleged violation of law, applying a fixed schedule of penalties to the development of a proposed stipulated order provides a level of standardization and predictability that can reduce the uncertainty and time that may otherwise be needed to negotiate a stipulated agreement.

Substantively, the existing Policy applies to the following scenarios, each from the Campaign Finance Reform Ordinance:

1. Contribution limit violations by candidates / committees (SF C&GCC § 1.114(a)—(b))
2. Contribution limit violations by contributors (SF C&GCC § 1.114(a))
3. Non-disclosure of required contributor information (SF C&GCC § 1.114.5)¹
4. Candidate self-lending violations (SF C&GCC § 1.116)
5. Noncompliant disclaimers on campaign advertisements and mass mailings (SF C&GCC § 1.161) and on electioneering communications (SF C&GCC § 1.162)²

Procedurally, the existing Policy provides that Staff are bound by its provisions until the Commission changes them. The Policy establishes an accelerated timeline whereby the Commission and a respondent might resolve a matter, including by giving a respondent 14 days to provide exonerating evidence after receipt of a proposed stipulation from Staff. The Policy provides further that absent exonerating evidence the Enforcement Division will initiate an enforcement action immediately after the 14th day, and will issue a Probable Cause Report within 21 days thereafter if the respondent declines to settle. This accelerated timeline does not clearly account for the requirement at S.F. Charter section C3.699-13(a) that Enforcement Staff provide the City Attorney and District Attorney ten working days to indicate whether they wish to investigate a matter before the Ethics Commission pursues administrative enforcement.

With respect to penalty amounts, the existing Policy encourages accelerated settlement by incentivizing settlements sooner rather than later in the administrative enforcement process. For example, for violations of the campaign contribution limits that candidates and committees commit, the Policy provides that when a respondent agrees to settle before Staff issues a Probable Cause Report, the respondent must pay a penalty of twice the excess contribution; when a respondent agrees to settle after Staff issues a Probable Cause Report, the respondent must pay a penalty of three times the excess contribution; and when a respondent agrees to settle after the Commission makes a finding of probable cause, the respondent must pay a penalty of four times the excess contribution. Each penalty is in addition to forfeiting the excess contribution, and no penalty may exceed \$5,000, irrespective of the Charter language providing that a respondent may be liable for the greater of \$5,000 or three times the amount which the person unlawfully contributed or received. S.F. Charter § C3.699-13(c)(i)(3).

Similarly, for violations of the candidate self-lending provisions and of the written disclaimer requirements for campaign advertisements, mass mailings, and electioneering communications, the Policy provides that when a respondent agrees to settle before Staff issues a Probable Cause Report, the respondent must pay a penalty of 20 percent of the maximum fine per violation, or \$1,000; when a respondent agrees to settle after Staff issues a Probable Cause Report, the respondent must pay a penalty of 50 percent of the maximum fine per violation, or \$2,500; and when a respondent agrees to

¹ The existing Policy identifies this requirement as arising under section 1.114(e), which was accurate at the time of adoption but which now refers to the aggregation of affiliated entity contributions. Staff's revision of the Policy will update all section references as needed.

² The existing Policy identifies this requirement as arising under section 1.161.5, which was accurate at the time of adoption but which has been redesignated. Staff's revision of the Policy will correct this section reference.

settle after the Commission makes a finding of probable cause, the respondent must pay a penalty of 80 percent of the maximum fine per violation, or \$4,000.

The scheduled penalties create a baseline that Staff may reduce or increase depending on mitigating or aggravating factors that apply in a given instance. The Policy enumerates those factors as follows:

1. Mitigation Factors:

- Absence of any intention to conceal, deceive, or mislead
- Violation was negligent or inadvertent
- Violation was isolated and not part of a pattern
- No prior record of violations of law with the Commission
- The degree to which the Respondent cooperated with the investigation
- The degree to which the Respondent demonstrated a willingness to remedy any violations (only applicable if a [respondent] agrees to a stipulation prior to issuance of Probable Cause Report)
- Respondent filed all required disclosure statements and/or amendments within 14 days of initial contact by Enforcement staff
- A disclosure containing the required information appeared on a mass mailing, electioneering communication, or campaign advertisement, but the disclosure was in font size that was not 14 point³

2. Aggravation Factors:

- Evidence shows an intent to conceal, deceive, or mislead
- Violation was deliberate
- Violation was part of a pattern
- Prior record of violations of law with the Commission
- The degree to which the Respondent was uncooperative with the investigation
- The degree to which the Respondent failed to demonstrate a willingness to remedy any violations
- Respondent failed to file required disclosure statements and/or amendments within 14 days of initial contact by Enforcement staff

If there is more than one violation, whether multiple instances of the same code section or violations of different code sections, the respondent is liable for the penalty amount of each violation. Finally, in the case of liability arising for disclosure statements that require amendment, the Policy provides that a respondent must amend such statements prior to the Commission's consideration of any proposed stipulation.

³ While the Fixed Penalty Policy refers to a general 14-point font requirement, the governing law imposes different font-size requirements depending on the medium in which the advertisement is distributed. With the possible exception of signs and billboards (the disclaimer size for which is based on a ratio to the advertisement's height), the largest font-size requirement is currently 12-point font. Staff's reexamination of the mitigation and aggravation factors will address this discrepancy.

Outline of Planned Revision Process

As discussed during the August 16, 2019 Commission Meeting, Staff proposes to revise the Fixed Penalty Policy in both substantive and procedural aspects, and to develop a revised Policy for the Commission's consideration that would result in the expansion of the current policy to be handled by a new "Streamlined Administrative Resolution Program" (the "Program").

Substantively, Staff have begun working to assess what additional kinds of violations might be handled through the Program, including violations not only from the area of campaign finance but also from the lobbying and governmental ethics contexts.

Procedurally, Staff will assess the penalty schedule and the mitigating and aggravating factors, including to identify any discretionary considerations that might exclude a respondent from participating in the Program. Staff will likewise assess circumstances in which warning letters might be appropriate in lieu of administrative penalties.

In assessing possible revisions, Staff will consult internally across program areas within the Commission and externally with peer agencies in other jurisdictions to elicit a better understanding of where an expanded Fixed Penalty Policy may be most appropriate. In addition, Staff will review and consult with Staff at the Fair Political Practices Commission to learn more about that agency's processes for handling streamlined settlements, including a recent expansion of those processes that took effect earlier this year.

Staff plans to pursue the following process in developing a revised Policy to bring to the Commission for its consideration and action:

1. Complete the analysis of considerations and approaches based on internal feedback and information from other jurisdictions to help evaluate what might be useful to apply in this jurisdiction;
2. Host at least two Interested Persons meetings to solicit focused input regarding the scope of a revised Fixed Penalty Policy and potential revisions;
3. Draft revised Fixed Penalty Policy that will govern implementation of the Streamlined Administrative Resolution Program;
4. Host at least two further Interested Persons meetings to solicit specific feedback in response to the draft revisions;
5. Revise the draft as appropriate;
6. Present findings and recommendations before the Commission for discussion and potential adoption, and iterate if necessary;
7. After Commission approval, begin implementation of the new Program.

Staff welcomes any questions and further input from the Commission on these preliminary considerations at its September meeting.

Attachment 1

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

Introduction

At its July 22, 2013 meeting, the Ethics Commission approved the following policies to establish fixed penalties for violations of certain provisions of the Campaign Finance Reform Ordinance (“CFRO”), San Francisco Campaign and Governmental Conduct Code (“C&GC Code”) section 1.100, et seq. Violations of the sections identified below are generally discovered during a review of campaign finance statements or other disclosure statements and, in general require little, if any, additional investigation or other evidence to show that the violation occurred. While the policies will generally require a Respondent to enter into a stipulated order with the Commission, each Respondent remains free to exercise his or her rights under the Enforcement Regulations to move through the hearing process for any alleged violation of law.

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

If there is more than one violation, either multiple instances of the same code section and/or different code sections, Respondent will be liable for the penalty amount of each violation. If a violation pertains to a law that requires a campaign or other disclosure statement to be amended, the amended statement must be filed prior to the stipulation’s approval.

Violations of CFRO Section 1.114 by Candidates

CFRO section 1.114(a)(1) prohibits a candidate committee from soliciting or accepting a contribution from any person that will cause the contribution received from that person to exceed \$500. Section 1.114(b) prohibits any corporation from making a contribution to a candidate committee. Section 1.114(e) states that if the cumulative amount of contributions received from a contributor is \$100 or more, the committee may not deposit the contribution unless the committee has the following information: the contributor’s full name; the contributor’s street address; the contributor’s occupation; and the name of the contributor’s employer or, if the contributor is self-employed, the name of the contributor’s business.¹

Under section 1.114(f), each committee that receives a contribution that exceeds the contribution limit or that does not comply with the other requirements of section 1.114 “shall pay promptly” the excess amount to the Ethics Commission, for deposit into the City’s General Fund.

The Commission approved the following schedule of settlement and penalties to govern Respondent candidates/candidate committees that violate section 1.114.

1. If, during a preliminary review, there is a reason to believe that a candidate committee may have committed a violation of section 1.114(a)(1), (b) or (e), Enforcement staff will notify the candidate committee of the violation(s) and advise that the matter is in preliminary review. The notice will provide the following information:
 - a. The committee has fourteen (14) days to forfeit the excess contribution or provide evidence as to why there is not a violation; and
 - b. If no such evidence is presented, in addition to forfeiting the excess contribution, an enforcement action will be initiated immediately after the fourteenth (14th) day; and

- c. A Probable Cause Report will be issued 21 business days after the enforcement action is initiated.
2. If evidence is presented prior to the 14-day deadline demonstrating that there is no violation, the matter will be dismissed by the Executive Director.
3. If evidence is presented after the 14-day deadline demonstrating that there is no violation, the Commission will review the evidence and determine whether the matter should be dismissed in closed session.
4. If no exonerating evidence is presented prior to the 14-day deadline, Respondent must forfeit the amount of each excess contribution. In addition, a formal enforcement action will be initiated with the following schedule for stipulated orders:
 - a. Stipulation prior to issuance of Probable Cause Report – Respondent must sign stipulation stating that a violation(s) occurred and pay a settlement amount equal to two times the amount of the total excess contribution(s) but not to exceed \$5,000 per violation (mitigation/aggravation factors may apply).
 - b. Stipulation after issuance of Probable Cause Report – Respondent must sign stipulation stating that a violation(s) occurred and pay a settlement amount equal to three times the amount of the total excess contribution(s) but not to exceed \$5,000 per violation (mitigation/aggravation factors may apply).
 - c. Stipulation after the Commission makes a finding of probable cause – Respondent must sign stipulation stating that a violation(s) occurred and pay a settlement amount of four times the amount of the total excess contribution(s) but not to exceed \$5,000 per violation (mitigation/aggravation factors may apply).

Violations of CFRO Section 1.114(e) by Committees

Section 1.114(e) provides that no committee – not just candidate committees – may deposit any contribution that causes the total amount of contributions received from a contributor to total \$100 or more unless the committee has information regarding the contributor’s full name, street address and occupation. The same procedures set forth above regarding violations of section 1.114(e) by candidate committees apply also to other committees that file reports with the Ethics Commission.

Violations of CFRO Section 1.114(a) by Contributors

Section 1.114(a)(1) prohibits any person other than a candidate from making a contribution that exceeds \$500 to a candidate committee; section 1.114(a)(2) prohibits any person from making a contribution that will cause the total amount contributed by such person to all candidate committees in an election to exceed \$500 multiplied by the number of City elective offices to be voted on in that election.² On June 24, 2013, the Commission approved the issuance of a Contributor Guide. Now that this guide is available to the public, contributors are on notice that they are personally subject to the provisions set forth in section 1.114. The following schedule of settlement and penalties will govern Respondent contributors who violate section 1.114.

1. If, during a preliminary review, there is a reason to believe that a contributor may have committed a violation of section 1.114(a)(1) or (a)(2), Enforcement staff will notify the contributor of the violation(s) and advise that the matter is in preliminary review. The notice will provide the following information:
 - a. The contributor has fourteen (14) days to provide evidence as to why there is not a violation;
 - b. If no such evidence is provided, an enforcement action will be initiated immediately after the fourteenth (14th) business day; and
 - c. A Probable Cause Report will be issued 21 business days after the enforcement action is initiated.
2. If evidence is presented prior to the 14-day deadline demonstrating that there is no violation, the matter will be dismissed by the Executive Director.
3. If evidence is presented after the 14-day deadline demonstrating that there is no violation, the Commission will review the evidence and determine whether the matter should be dismissed in closed session.
4. If no exonerating evidence is presented prior to the 14-day deadline, a formal enforcement action will be initiated with the following schedule for stipulated orders:
 - a. First Offense – Respondent contributor must sign a stipulation agreeing that he or she violated the law. No fine/penalty amount will be assessed. If Respondent contributor refuses to sign a stipulation, staff will issue a Probable Cause Report and follow the schedule in sections b.ii and b.iii below.
 - b. Two or More Offenses:
 - i. Stipulation prior to issuance of Probable Cause Report – Respondent must sign stipulation stating that a violation(s) occurred and pay a settlement amount equal to two times the amount of the total excess contribution(s) but not to exceed \$5,000 per violation (mitigation/aggravation factors may apply).

- ii. Stipulation after issuance of Probable Cause Report – Respondent must sign stipulation stating that a violation(s) occurred and pay a settlement amount equal to three times the amount of the total excess contribution(s) but not to exceed \$5,000 per violation (mitigation/aggravation factors may apply).
- iii. Stipulation after the Commission makes a finding of probable cause – Respondent must sign stipulation stating that a violation(s) occurred and pay a settlement amount of four times the amount of the total excess contribution(s) but not to exceed \$5,000 per violation (mitigation/aggravation factors may apply).

Violations of CFRO Section 1.116

CFRO section 1.116 sets limits on the amount of money a candidate may loan to his or her candidate committee. The limits are \$15,000 for a candidate for the Board of Supervisors, the Board of Education or the Community College District, \$120,000 for a candidate for Mayor, or \$35,000 for a candidate for Assessor, Public Defender, City Attorney, Treasurer, District Attorney, or Sheriff.³ Under section 1.116, in addition to any other penalty, a loan made by a candidate to his or her campaign in excess of the allowable amounts is deemed a contribution to the campaign and may not be repaid to the candidate. The following schedule of settlement and penalties will govern Respondent candidates who violate section 1.116.

1. If, during a preliminary review, there is a reason to believe that a candidate may have committed a violation of section 1.116, Enforcement staff will notify the candidate of the violation(s) and advise that the matter is in preliminary review. The notice will provide the following information:
 - a. The candidate has fourteen (14) days to provide evidence as to why there is not a violation; and
 - b. An enforcement action will be initiated immediately after the fourteenth (14th) day; and
 - c. A Probable Cause Report will be issued 21 business days after the enforcement action is initiated.
2. If evidence is presented prior to the 14-day deadline demonstrating that there is no violation, the matter will be dismissed by the Executive Director.
3. If evidence is presented after the 14-day deadline demonstrating that there is no violation, the Commission will review the evidence and determine whether the matter should be dismissed in closed session.
4. If no exonerating evidence is presented prior to the 14-day deadline, a formal enforcement action will be initiated with the following schedule for stipulated orders:
 - a. Stipulation prior to issuance of Probable Cause Report – Respondent must sign stipulation stating that a violation(s) occurred and pay a settlement amount equal to 20 percent of the maximum fine per violation, or \$1,000 (mitigation/aggravation factors may apply).
 - b. Stipulation after issuance of Probable Cause Report – Respondent must sign stipulation stating that a violation(s) occurred and pay a settlement amount of 50 percent of the maximum fine per violation, or \$2,500 (mitigation/aggravation factors may apply).
 - c. Stipulation after the Commission makes a finding of probable cause – Respondent must sign stipulation stating that a violation(s) occurred and pay a settlement amount equal to 80 percent of the maximum fine per violation per violation, or \$4,000 (mitigation/aggravation factors may apply).

Violations of CFRO Sections 1.161, 1.161.5, or 1.162

Several sections of the CFRO require written disclaimer statements that, among other things, identify who paid for the mass mailing (section 1.161), electioneering communication (section 1.161.5), and campaign advertisement (section 1.162). These printed disclosures must be in at least 14 point type and in a color or print that contrasts with the background so as to be easily legible to the intended public. The following schedule of settlement and penalties will govern committees that violate the disclaimer and disclosure sections of the CFRO.

1. If, during a preliminary review, there is a reason to believe that a committee may have committed a violation of any part of section 1.161, 1.161.5, or 1.162, Enforcement staff will notify the committee and advise that the matter is in preliminary review. The notice will provide the following information:
 - a. The committee has fourteen (14) days to provide evidence as to why there is not a violation; and
 - b. An enforcement action will be initiated immediately after the fourteenth (14th) day; and
 - c. A Probable Cause Report will be issued 21 business days after the enforcement action is initiated.
2. If evidence is presented prior to the 14-day deadline demonstrating that there is no violation, the matter will be dismissed by the Executive Director.

3. If evidence is presented after the 14-day deadline demonstrating that there is no violation, the Commission will review the evidence and determine whether the matter should be dismissed in closed session.
4. If no exonerating evidence is presented prior to the 14-day deadline, a formal enforcement action will be initiated with the following schedule for stipulated orders:
 - a. Stipulation prior to issuance of Probable Cause Report – Respondent must sign stipulation stating that a violation(s) occurred and pay a settlement amount equal to 20 percent of the maximum fine per violation, or \$1,000 (mitigation/aggravation factors may apply).
 - b. Stipulation after issuance of Probable Cause Report – Respondent must sign stipulation stating that a violation(s) occurred and pay a settlement amount equal to 50 percent of the maximum fine per violation, or \$2,500 (mitigation/aggravation factors may apply).
 - c. Stipulation after the Commission makes a finding of probable cause – Respondent must sign stipulation stating that a violation(s) occurred and pay a settlement amount equal to 80 percent of the maximum fine per violation, or \$4,000 (mitigation/aggravation factors may apply).

Factors in Mitigation and Aggravation

The Commission will consider each mitigating or aggravating factor to determine how much weight should be given to each factor. For example, an intent to conceal, deceive or mislead will be considered much more egregious and weigh more heavily against a Respondent, so much so that the existence of mitigating factors may not offset it. The following lists of mitigation and aggravation factors are not exhaustive.

1. Mitigation Factors:

- Absence of any intention to conceal, deceive, or mislead
- Violation was negligent or inadvertent
- Violation was isolated and not part of a pattern
- No prior record of violations of law with the Commission
- The degree to which the Respondent cooperated with the investigation
- The degree to which the Respondent demonstrated a willingness to remedy any violations (only applicable if a agrees to a stipulation prior to issuance of Probable Cause Report)
- Respondent filed all required disclosure statements and/or amendments within 14 days of initial contact by Enforcement staff
- A disclosure containing the required information appeared on a mass mailing, electioneering communication, or campaign advertisement, but the disclosure was in font size that was not 14 point

1. Aggravation Factors:

- Evidence shows an intent to conceal, deceive, or mislead
- Violation was deliberate
- Violation was part of a pattern
- Prior record of violations of law with the Commission
- The degree to which the Respondent was uncooperative with the investigation
- The degree to which the Respondent failed to demonstrate a willingness to remedy any violations
- Respondent failed to file required disclosure statements and/or amendments within 14 days of initial contact by Enforcement staff

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Section 1.114(d) states that for purposes of the contribution limits, the contributions of an entity whose contributions are controlled by any individual must be aggregated with contributions made by that individual and any other entity whose contributions are directed and controlled by the same individual. Because violations of section 1.114(d) are not easily discovered during a review of campaign disclosure statements, they are not included in this settlement and penalties scheme. Instead, such violations will be handled via the normal course of handling violations pursuant to the Commission's Regulations for Investigations and Enforcement Proceedings.

In addition, section 1.114(c), adopted by the voters as part of Proposition O in 2000, sets limits on the amount of contributions a person may make to non-candidate committees that make expenditures to support or oppose candidates. On September 20, 2007, a federal district court issued a preliminary injunction enjoining enforcement of

section 1.114(c); since then, the Commission has not enforced the section. The court has since issued a permanent injunction prohibiting the City from enforcing section 1.114(c).

² Please note that the Ethics Commission will no longer enforce the limit in Section 1.114(a)(2) in light of recent United States Supreme Court jurisprudence. See Ethics Commission Resolution adopted May 28, 2014; *McCutcheon v. Federal Election Commission*, 752 U.S. ___, No. 12-536 (S.Ct. Apr. 2, 2014).

³ Publicly-financed candidates must agree not to loan or donate to their campaigns, in total, more than \$5,000 of their own money; nor may they accept any loan from anyone else. CFRO § 1.140(a)(1)(D). The settlement and penalties structure discussed here do not apply to violations of section 1.140(a)(1)(D).