



San Francisco Ethics Commission

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October 4, 2021

To: Members of the Ethics Commission

From: Jeff Pierce, Enforcement Director

Subject: **Agenda Item 10: Enforcement Process and Consideration of Proposed Stipulated Orders During Public Session**

Summary and Action Requested

The Commission's Enforcement Staff has prepared this report regarding Enforcement processes and the presentation and consideration of proposed stipulated orders during public session following several questions posed at the August Commission meeting about those processes.

This report is provided for the Commission's background and discussion purposes and no action by the Commission is required on this item.

Background

The Commission's Enforcement Regulations provide that the Executive Director may enter negotiations with a respondent "at any time" in order "to resolve the factual and legal allegations in a complaint by way of a stipulated order" – that is, through a negotiated settlement.¹ The Regulations require that the stipulated order "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."² Although the Executive Director is empowered to negotiate a settlement and propose the resolution of an enforcement matter by those means, the settlement becomes effective only with approval of the Commission by a vote of at least three Members in open session at a Commission meeting.³

At the Commission's regular meeting on August 13, 2021, Enforcement Staff presented several proposed stipulated orders for the Commission's consideration. Two of those proposals were removed from the consent calendar to permit the Commission to discuss them.⁴ Arising from those specific discussions, Commissioner Bell requested that the Commission place on a future meeting agenda the opportunity to generally discuss the enforcement and settlement processes, including what scope of information regarding an investigative matter is suitable for discussion during the Commission's consideration of a proposed stipulated order.

For purposes of that discussion, this memo provides the background on factors considered in the enforcement and settlement processes, including in the presentation of proposed stipulated orders

¹ Enforcement Regulations (Enf. Reg.) § 12(A).

² *Id.*

³ *Id.* § 12(E)–(F).

⁴ Under the Commission's Enforcement Regulations, proposed stipulated orders are heard on consent unless a Commissioner requests to sever an item for discussion. See *id.* § 12(E).

before the Commission in public session, and the purposes those factors serve within the larger administrative enforcement context. Those factors include the following:

1. Legal Considerations
 - a. Confidentiality considerations counsel for limited disclosure by Staff
 - b. Due process considerations counsel for limited inquiry by the Commission
2. Practical Considerations
 - a. Preserving the incentive to settle
 - b. Protecting sources and investigative methods
 - c. Safeguarding the Commission's fairness and independence

As discussed in detail below, the need to balance these considerations is inherent in considering and discussing any proposed stipulation, decision, and order to resolve an enforcement matter.

Proposed Stipulated Orders and Commission Discussion

The legal and practical considerations that have historically factored into the presentation and discussion of proposed stipulations are discussed below.

1. Legal Considerations

- a. **Confidentiality provisions counsel for limited disclosures about matters that exceed the scope of facts and liability identified in a proposed stipulation brought prior to a probable cause determination.**

The Charter requires that the Commission conduct its investigations confidentially, providing a narrow carveout for the disclosure of information prior to a determination of probable cause only “as necessary to conduct the investigation.”⁵ The Charter deems the unauthorized release of confidential information to be sufficient grounds for the termination of any employee, or the removal of any Commissioner, who releases confidential information.⁶

In the case of a proposed stipulated order, the parties agreed to resolve the facts and violations detailed in the proposed order. By agreeing to settle and resolve the factual and legal issues in the matter and to reach a final disposition without an administrative hearing, and with respondents acknowledging responsibility for the violations cited, the parties have therefore stipulated that probable cause is satisfied as to those facts and violations, as well as any facts cited for purposes of assessing proposed penalties. For any other facts or counts that may have been identified but not brought, probable cause has not yet been established.⁷ Because probable cause does not exist for facts or theories of liability not

⁵ S.F. Charter § C3.699-13(a).

⁶ *Id.*

⁷ Indeed the Charter and the Enforcement Regulations provide that probable cause for any additional liability cannot be established until after the respondent has the opportunity to respond, in writing, to Staff's probable cause report, and to offer counter evidence and argument in a probable cause conference before the Executive Director. See S.F. Charter § C3.699-13(b); Enf. Reg. § 7(B)–(C).

established in the proposed stipulation, Staff have little opportunity to speak to additional evidence that may have been obtained or might yet be gathered by further investigation.

Additionally, in pursuing settlement with respondents and their counsel, Staff does so with a mutual understanding with respondents that settlement communications are confidential under the governing provisions of state law. The Evidence Code, for example, provides that a compromise or offer of compromise is inadmissible to establish liability should settlement fail and separate proceedings become necessary.⁸ The Commission's Enforcement Regulations codify this commitment to confidential settlement communications, providing that "the details and supporting documentation for unsuccessful settlement negotiations" is inadmissible during probable cause proceedings or a hearing on the merits.⁹ Discussion during presentation of a proposed stipulated order that is broader than the terms of the settlement itself therefore risks requiring disclosure of confidential communications. It may likewise risk requiring that Staff renege agreements made in the course of bargaining to exclude facts or liability for purposes of reaching settlement.

In short, under the Charter, the Evidence Code, and the Enforcement Regulations, discussion of the facts and liability identified within the stipulation, along with any recitation of facts or analysis considered in the determination of penalties, is squarely within the sphere of lawful consideration, while discussion exceeding that sphere poses risks to the agency's confidentiality obligations.

b. Given the Commission's role as factfinder and judge in administrative enforcement hearings, due process considerations counsel limited inquiry by the Commission in seeking to discover facts or liability beyond that identified in a proposed stipulation brought prior to a probable cause determination.

Consideration of any settlement agreement to resolve an enforcement matter inevitably can give rise to questions not explicitly addressed in the proposed stipulation and exhibit as presented. To the extent that those inquiries seek or speculate about evidence of liability beyond that identified in the proposed stipulation, however, the Commission's consideration of proposed settlements can risk prejudicing subsequent proceedings in a way that may, or may appear to, compromise respondents' due process interests.

Both the federal and state constitutions limit the power of government to deprive citizens of life, liberty, or property.¹⁰ Prior to any such deprivation, an individual is entitled under the law to "due process," by which they may assert any rights or defenses affecting the proposed deprivation. The amount and type of process due depends upon the severity of the deprivation at stake. The process afforded a criminal defendant facing a deprivation of liberty is more robust than that afforded a respondent in an administrative proceeding who is facing potential financial loss through imposition of a monetary penalty. Due process interests nevertheless govern the Commission's

⁸ Cal. Evid. Code § 1152. Similarly, under the Federal Rules of Evidence, a plea, a plea discussion, or any related statement is generally inadmissible in a civil or criminal case. Fed. R. Evid. 410.

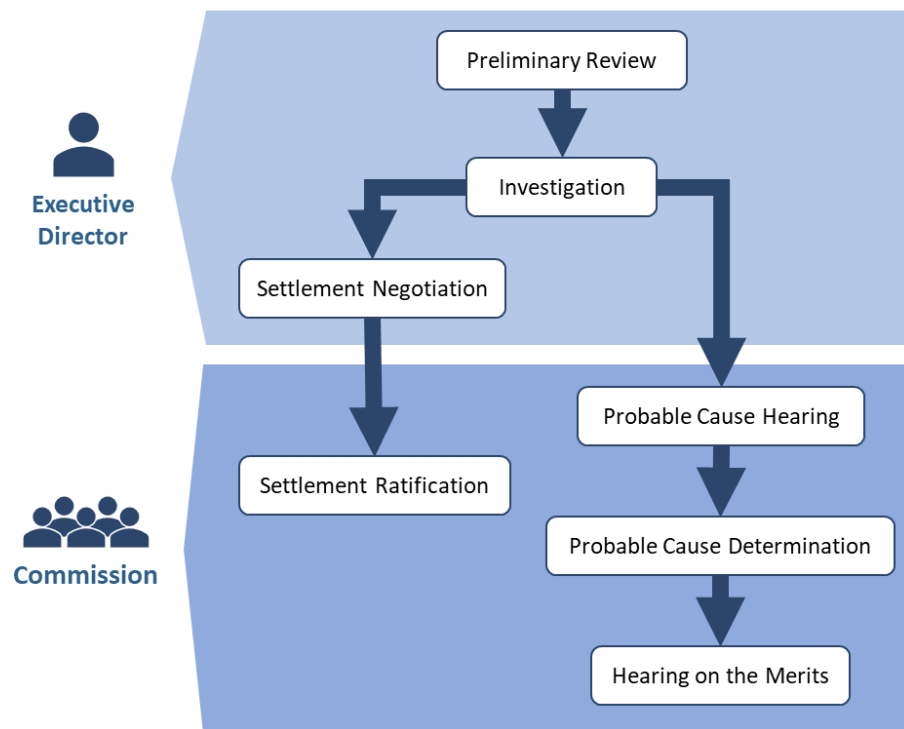
⁹ Enf. Reg. § 12(B).

¹⁰ U.S. Const. amend. XIV, § 1; Cal. Const. art. I, § 7(a).

administrative enforcement processes to ensure those processes maximize fair treatment for any respondent who is alleged to have violated the law.

In the Commission's recent history, these due process considerations were central to the comprehensive programmatic review of the enforcement process the Commission undertook as an organizational priority beginning in the fall of 2016. That review culminated in the adoption of new Enforcement Regulations in early 2018. In that review process, the Commission examined its regulatory framework for enforcement and the likely impact of various prospective regulatory proposals.¹¹

Enforcement Process Pre-2018 Reform



As illustrated above, under the enforcement model in place prior to the 2018 regulatory reforms, the staff was charged with conducting preliminary review, investigations, and settlement negotiations. The Commission sat as the hearing officer for both the Probable Cause Hearing and the Hearing on the Merits. One issue that arose within that framework, as described during the reform process, was that little opportunity existed for Staff to conduct additional investigation or discovery after the Probable Cause Hearing in preparation for a Hearing on the Merits.¹² Consequently, in practice Staff prepared and presented the entirety of its case to the Commission during the Probable Cause Hearing. In instances where the Commission determined that probable cause existed, the Commission would then hear the same evidence again at the Merits Hearing.¹³ As a result, above and beyond the duplication of resources this process entailed, the same body charged with determining probable cause would then rehear the

¹¹ See, e.g., Staff Enforcement Reports for October 2016, August 2017, September 2017, and October 2017.

¹² Oct. 13, 2016, Staff Enf. Report, p. 6.

¹³ *Id.*

matter to determine liability and assess penalties based on the same body of evidence. Because no new evidence was before the Commission during the second stage than there had been during the first stage, the risk arising from this process was that the hearing might serve only to afford the Commission an opportunity to sanction its prior decision, with its objectivity in the second stage having been compromised by virtue of having participated fully in the first stage.

Among other things, the Enforcement Regulations the Commission adopted in early 2018 were designed to reform that framework and establish an “appropriate balance between assignment of functions to the Executive Director and [to the Members of the] Ethics Commission.”¹⁴ In proposing those changes, Staff sought “to maximize Due Process available to respondents; ensure confidential, transparent, and fair outcomes; ensure independence where decisions are at risk of perceived subjectivity or bias; and provide appropriate Commission oversight.”¹⁵ The updated framework proposed to accomplish these aims, in part, by adopting a structure already in place at the Fair Political Practices Commission and the Los Angeles City Ethics Commission, which was to have delegated to the Executive Director authority to hold a probable cause conference and to make probable cause determinations.¹⁶

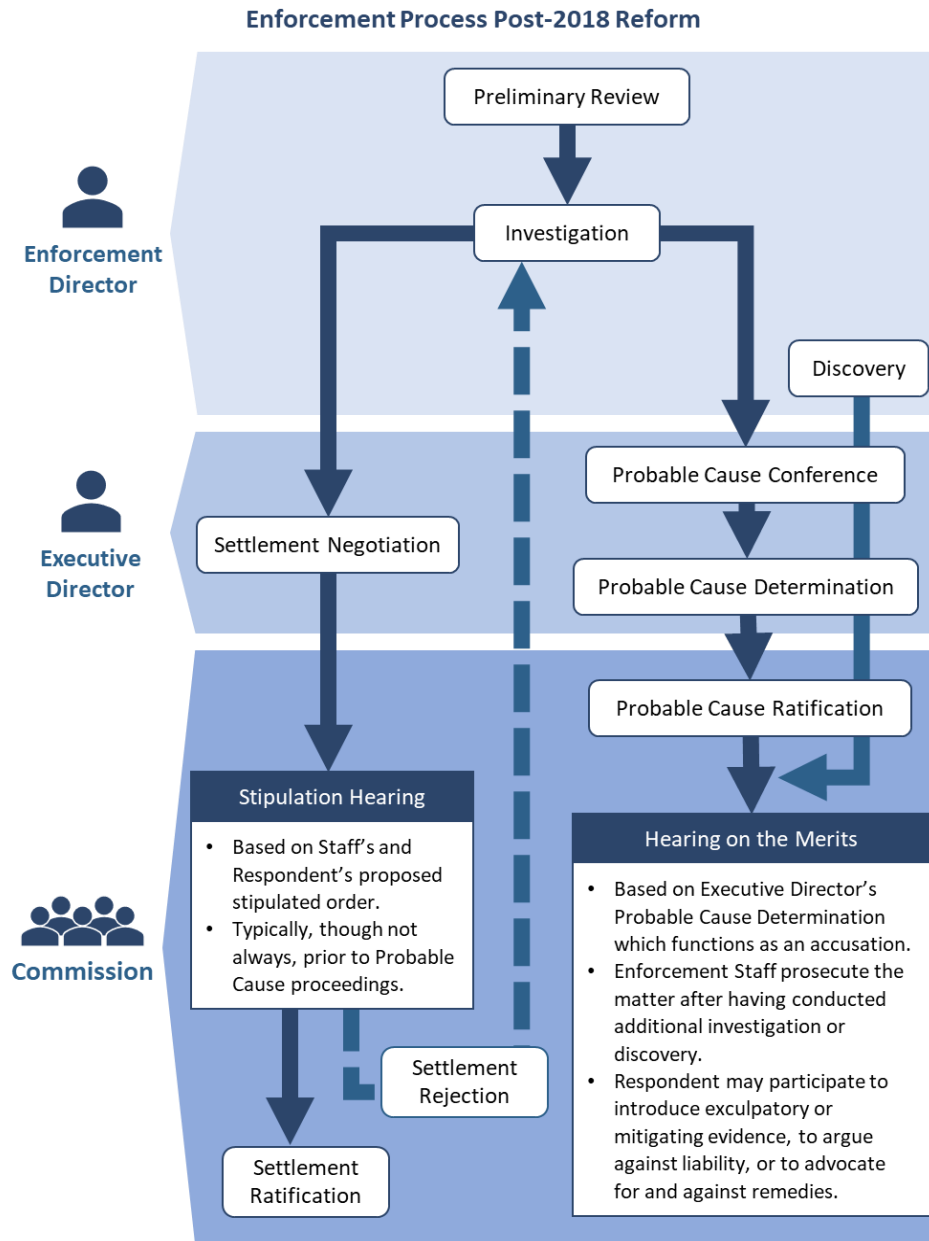
As illustrated below, among the more significant reforms the Commission adopted in 2018 was to have established a new structure to clarify roles that further strengthened due process interests through a heightened division of labor:

- The Enforcement Director manages complaint review and conducts independent investigations;
- The Executive Director oversees settlement negotiation and serves as probable cause hearing officer;
- The Commission ratifies proposed orders and, no longer responsible for conducting probable cause hearings, preserves and maximizes its objectivity for any Hearing on the Merits.

¹⁴ Aug. 24, 2017, Preliminary Proposals re: Enf. Reg., p. 2.

¹⁵ *Id.*

¹⁶ Enf. Reg. § 7(D)(6). Notably the Commission must still ratify the Executive Director’s recommended probable cause determination, which it does based on a review of the Director’s Probable Cause Determination (*i.e.* a report) rather than a rehearing of the evidence. *Id.*



As also noted in the visualization above, the Commission retains authority to reject a proposed stipulation. Such rejection can generally signal any of three potential outcomes. First, it may signal that the Commission has concluded that there is insufficient evidence to establish liability, or that there is insufficient liability to warrant administrative penalties. Second, the Commission may have indicated a desire that Staff return at a future meeting with a renegotiated settlement, perhaps to differently address facts, counts, or penalty amounts. Third it may relay a desire not to settle the matter at all, but rather to consider the matter more fully through administrative litigation, including for example to hear directly from respondents or witnesses. Should renegotiation prove unsuccessful, or should Staff move directly to prosecute the matter through administrative proceedings, the Commission will ultimately sit

as factfinder and judge, identifying liability and imposing remedies like financial penalties through a formal Hearing on the Merits.

Because the Commission retains authority to reject a proposed stipulation, important due process considerations attend the discussion of proposed stipulations. Broad discussion of evidence or potential liability beyond what is presented in a proposed stipulation may begin to resemble a probable cause hearing. As described above, because the newer Enforcement Regulations explicitly reassigned that role to the Executive Director with the goal of preserving the Commission's objectivity, such broad discussion risks undermining the reforms the Commission pursued and adopted in 2018.

2. Practical Considerations

A number of practical considerations likewise inform the settlement process and the presentation of proposed stipulated orders.

a. Discussion of facts or liability not in the proposed stipulation may serve to deter settlement prior to probable cause determinations.

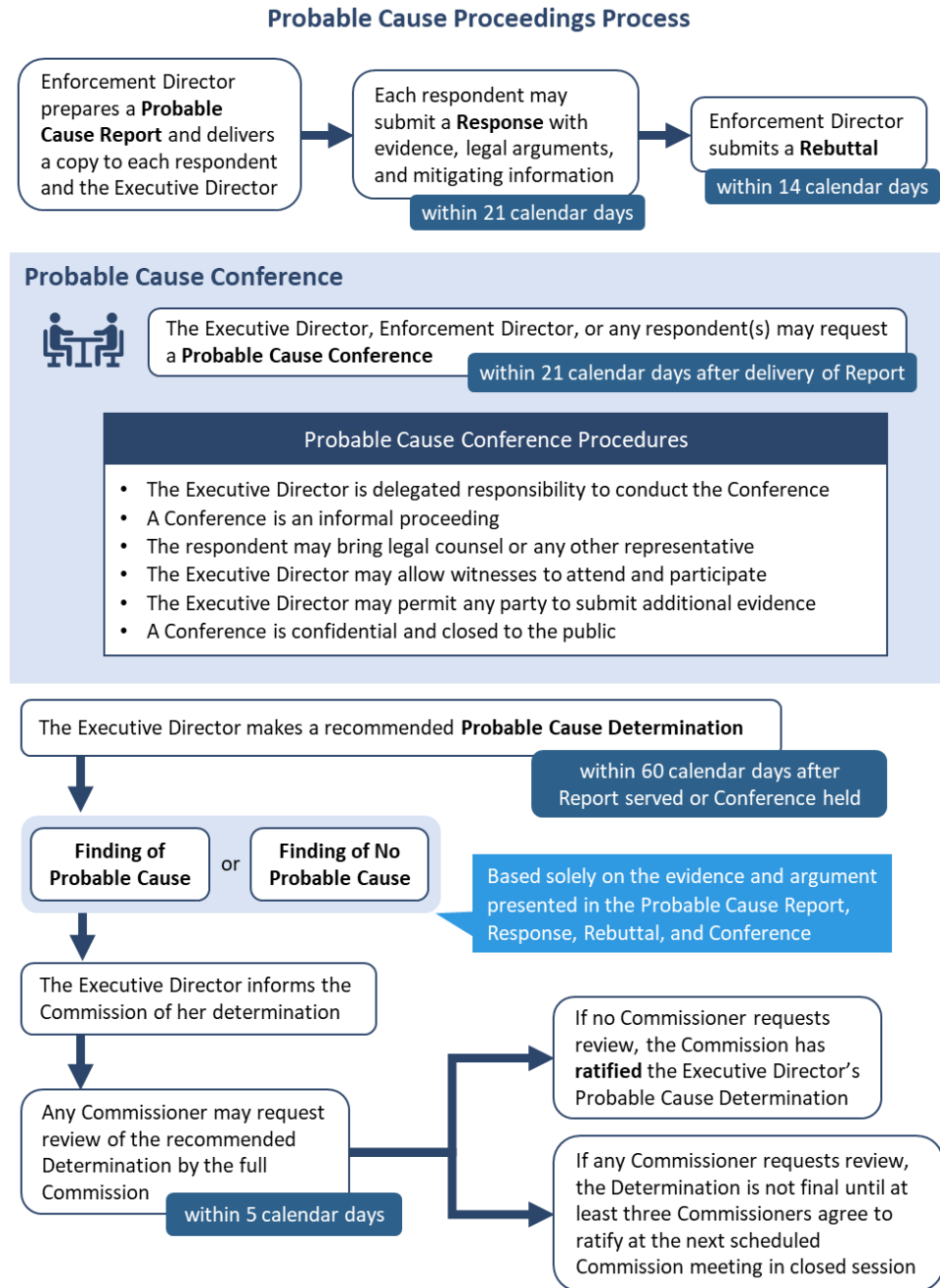
As a matter of current practice, the vast majority of proposed stipulations that Staff has brought to the Commission have come prior to a determination of probable cause. As with peer administrative agencies with government ethics oversight, this process enables appropriate resolution of enforcement matters through a publicly transparent process that also generally saves considerable time, resources, and public expense.

Indeed, administrative enforcement agencies and respondents have shared interests in settling matters when possible and appropriate, and ahead of resorting to more formal administrative proceedings that involve greater time, cost, and public expense to resolve the matter. When Staff bring a proposed stipulated order for Commission consideration, the settlement process and documents resulting from it attempt to fairly balance those shared interests in a way that both parties agree fairly represents the facts, the law, and the appropriate remedies to be assessed.

As noted above, communications between Staff and respondents during the course of settlement negotiations remain confidential under state evidence law and under the Commission's Enforcement Regulations, as also under federal law for practice before federal agencies or federal courts. The same policy rationale underlies each of these legal provisions, namely that the parties will be deterred from engaging in serious, good faith negotiations if – in the absence of successful settlement – anything they say or any materials considered might subsequently be used against respondents or defendants during a subsequent proceeding. In short, the legal system at every level recognizes that confidentiality is necessary to encourage settlement and to avoid rules and procedures that may instead have a chilling effect on settlement efforts.

As a practical matter, discussions of additional facts not in evidence in a proposed stipulation, or inquiry about additional theories of liability that could potentially have been charged but did not appear in the proposed settlement (but which might be charged in subsequent proceedings), may have the unintended consequence of diminishing the agency's ability to bring respondents to the negotiating table. This dynamic, in turn, could result in the Commission requiring a greater expenditure of resources in the prosecution of complaints through formal administrative proceedings, which in turn would likely

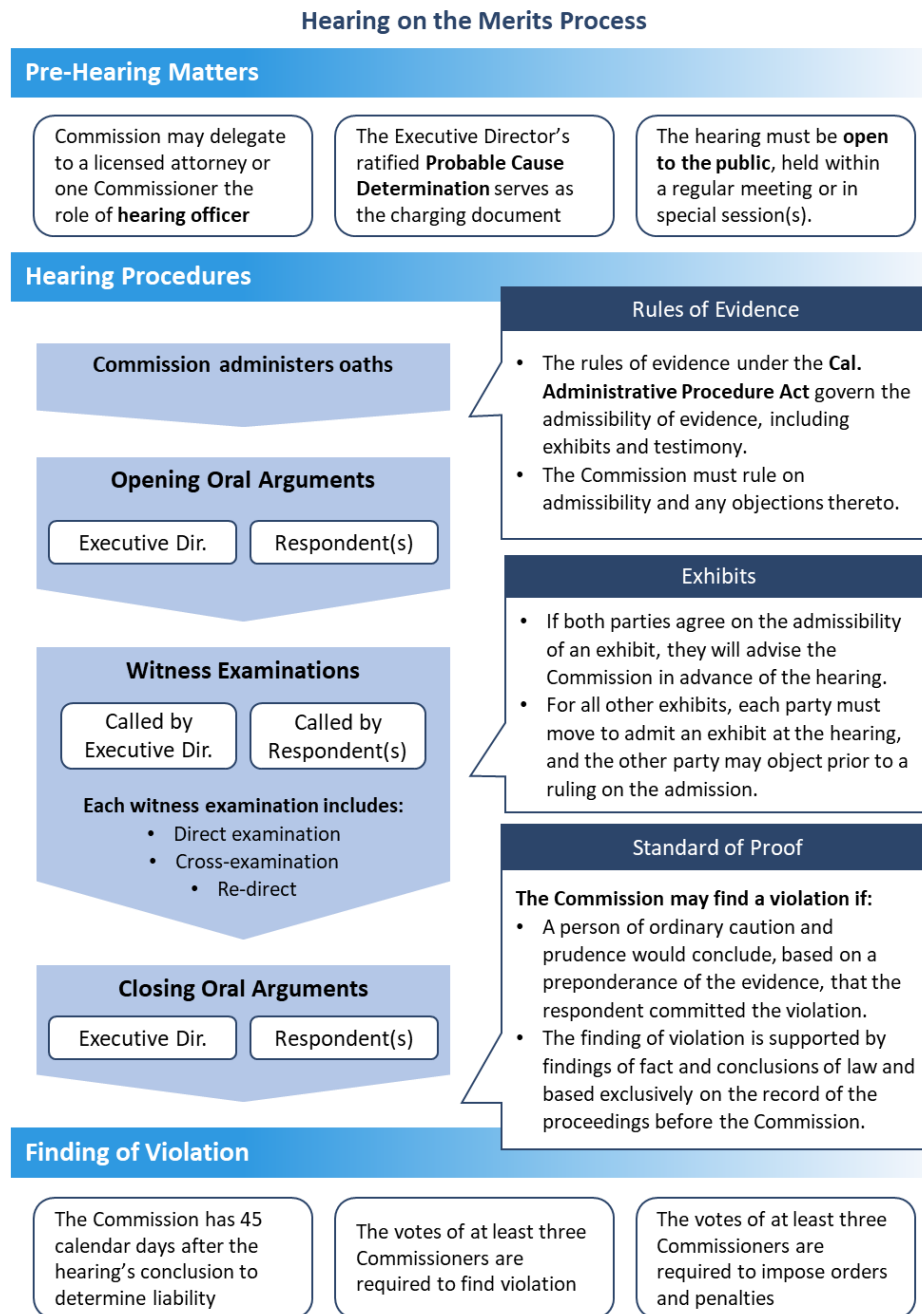
result in resolving far fewer matters over time than it might have otherwise. The first stage of these proceedings, Probable Cause, is illustrated here:



As shown above, the process set forth in the Regulations for probable cause proceedings entail multiple layers, each governed by specified timeframes and deadlines.¹⁷ These include briefing by Staff and respondents, a probable cause conference before the Executive Director during which the parties are permitted to submit evidence and call witnesses, deliberation and issuance of a probable cause

¹⁷ See generally Enf. Reg. § 7.

determination by the Executive Director, and review and ratification (or rejection) by the Commission.¹⁸ Should the Commission ratify a determination that probable cause exists to believe that a violation of law has occurred, the Commission may then proceed to a hearing on the merits, as depicted here:



As illustrated above, the hearing process is designed to be thorough and robust.¹⁹ As a consequence, it entails the investment of considerably more time and resources for all parties, including Staff,

¹⁸ *Id.*

¹⁹ See generally Enf. Reg. §§ 8-9.

respondents, and the Commission. For every matter, Staff evaluate the suitability for resolution of that matter whether through settlement or administrative proceedings.

b. Discussion of facts or liability not in the proposed stipulation may veer inappropriately to addressing confidential investigative methods, impacting the effectiveness of investigations.

Public discussion of proposed stipulations may prompt questions about how a particular case was initiated or by what means certain allegations came to the attention of Enforcement Staff. This line of inquiry, however, speaks to the manner and methods by which Investigators source investigative leads or generate complaints. This may also be the case with inquiries about whether Investigators took certain steps or actions in the course of investigating allegations, for example regarding whether a subpoena may have been issued for certain records, or whether certain witnesses may have been interviewed. Answering these inquiries could require disclosure of investigative methods and techniques, which can have the unintended result of undermining the agency's ability to successfully deploy those methods in subsequent investigations. As a result, inquiries by the Commission about these procedures during its public consideration of a proposed settlement is something Investigators would decline to address specifically.

c. Discussion of facts or liability not in the proposed stipulation may undermine the Commission's actual or perceived fairness and impartiality, potentially diminishing public confidence in the Commission's deliberative processes.

Finally, and more broadly, it is important to recall that a number of general principles of law and policy operate as a backdrop against which the Ethics Commission as an agency is structured to implement its enforcement mandate. Chief among these general principles is that the department is charged with the "the impartial and effective administration and implementation" of the legal provisions within its jurisdiction.²⁰ To maintain its legitimacy and efficacy as an independent oversight entity, the Commission must be impartial and effective both in reality and in appearance, both in investigative measures taken by the Staff and in deliberations undertaken by the Commission to resolve investigative matters. Public confidence in the agency's adherence to political neutrality and due process considerations are paramount in achieving this aim.

Numerous structural elements safeguard the agency's fairness, integrity, and independence. Several of those elements endeavor to insulate the five-member Commission from the potential of external pressure exerted by those whom the Commission regulates. These include, for example: (1) each Member of the Commission is appointed by a separate City elective officer (or, in the case of the Member whom the Board of Supervisors appoints, a body of such officers);²¹ (2) the Commission selects its own Chair and Vice-Chair rather than those officials being designated by any appointing authority;²² (3) Commission Members are subject to the same suspension and removal proceedings as other City officers, by which they can be removed only for especially wrongful conduct committed willfully;²³ and (4) the

²⁰ S.F. Charter § C3.699-10.

²¹ *Id.* § 15.100.

²² Eth. Comm'n Bylaws, Art. IV.

²³ S.F. Charter § 15.105(e).

Commission retains authority to appoint and remove its Executive Director, who in turn retains authority to appoint and remove Staff.²⁴

Several additional elements endeavor to safeguard the agency's work against the potential for misplaced political influence on the part of a Commissioner, the Executive Director, or a member of Staff, including: (1) Commission Members operate under a single, six-year term limit (and may at most fulfill the prior unexpired term when appointed to fill a vacancy of less than three years);²⁵ (2) the Commission may act only when it obtains at least three concurring votes;²⁶ (3) no Member or employee of the Ethics Commission may engage in conduct the Commission is charged with regulating, such as working as a registered lobbyist or campaign consultant or participating in campaigns, contributing to committees, or endorsing City candidates or ballot measures;²⁷ and (4) no Member of the Ethics Commission may hold employment with the City and County, and no employee of the Commission may hold any other employment with the City and County.²⁸

In tandem with maximizing due process available to respondents, these important structural safeguards are also designed to support robust enforcement practices that most effectively balance the legal and practical considerations discussed above with the interests of confidentiality and transparency in achieving fair and accountable outcomes.

Conclusion

As this agency continues to pursue its enforcement role in ensuring accountability in City government with a commitment to fairness, integrity, and independence, Staff will continue to endeavor to bring stipulations forward that as fully as possible describe the facts underlying liability and the factors analyzed in proposing penalty amounts. Feedback from the Commission's discussion of these matters will be helpful and important for informing that process as Staff seeks to best support the Commission in its vital deliberative processes rooted in both the letter and the spirit of the law.

²⁴ S.F. Charter § 15.101.

²⁵ *Id.* § 15.100.

²⁶ Eth. Comm'n Bylaws, Art. VII, § 1.

²⁷ S.F. Charter § 15.100(b)–(c).

²⁸ *Id.* § 15.100(b).