
SAN FRANCISCO ETHICS COMMISSION

Enforcement Hearing Guidebook (Draft)

April 7, 2023

Introduction

This guidebook provides general information about the Ethics Commission's administrative hearing process for enforcement matters. The purpose of the guidebook is to inform the Commission, respondents, staff, and the public about the rules that govern this process so that the process can be carried out in a manner that is efficient, fair, and transparent. Enforcement is a key aspect of the Commission's function because it serves to detect and punish violations and to encourage compliance by creating a deterrent effect.

The Charter of the City and County of San Francisco provides for the Commission to "hold a public hearing" to determine if a respondent has violated the laws administered by the Commission. This occurs only after the Commission has found that there is probable cause to believe the violation occurred. In 2018, the Commission adopted its current Enforcement Regulations to provide further detail about the processes for probable cause and public hearings. In some places, the Enforcement Regulations incorporate portions of the California Administrative Procedure Act. This guidebook seeks to summarize the rules set forth in the Charter, Campaign and Governmental Conduct Code, Enforcement Regulations, and California Administrative Procedure Act that govern the Commission's enforcement hearing process. The guidebook is organized based on the major phases of the hearing process: (I) probable cause proceedings; (II) preliminary (pre-hearing) matters; and (III) the public hearing on the merits.

Each section includes excerpts from the relevant laws, and where necessary for clarity, a plain language overview of what the law requires. All grey boxes contain legal excerpts. In several instances, the applicable rules are silent or unclear as to certain aspects of the hearing process. In these instances, this guidebook identifies the need for the Commission to decide how to proceed, offers possible options, and, in some instances, recommends one option as being most conducive to an efficient, fair, and transparent process. All blue boxes contain options and recommendations for addressing gaps or ambiguity in the law.

This guidebook is only a summary of existing rules and does not constitute a rule or regulation.

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I. Probable Cause

To initiate the Commission’s formal hearing process, the Enforcement Division first initiates Probable Cause Proceedings with the Executive Director. These proceedings work to establish whether probable cause exists to believe that a violation has occurred. If probable cause is found, the case moves forward toward a Hearing on the Merits.

A. Probable Cause Filings

The Director of Enforcement initiates Probable Cause Proceedings by delivering a Probable Cause Report to the Executive Director and the respondent. The first phase of Probable Cause Proceedings include a series of filings from all parties. Filings during the this phase are subject to page and formatting requirements.

- The Probable Cause Report (“PC Report”) is limited to 25 pages, exclusive of attachments. Reg 6.
- The parties’ Response(s) are limited to 25 pages, exclusive of attachments. Reg 6.
- The Enforcement Division’s Rebuttal is limited to 10 pages, exclusive of attachments. Reg 6.
- Evidence in all probable cause filings can rely on witness declarations, hearsay evidence, and any other relevant evidence. Reg 7(B)(6).

1. Probable Cause Report

Probable Cause Report (Enforcement Reg 7(B)(2)): “When the Director of Enforcement believes that probable cause exists to find a violation of law has occurred, the Director of Enforcement will prepare a written “Probable Cause Report” to commence probable cause proceedings. The Director of Enforcement must deliver a copy of the Probable Cause Report to each respondent, the Executive Director, and if applicable, a complainant who has alleged retaliation pursuant to Section 4.115 of the San Francisco Campaign & Governmental Conduct Code.”

PC Report – Content (Enforcement Reg 7(B)(2)): “The Probable Cause Report must include:

- i. Identification of the alleged violations;
- ii. A summary of the laws at issue;
- iii. A statement of the evidence gathered through the investigation, including any exculpatory and mitigating information of which Staff has knowledge;
- iv. Notification that the respondent has the right to respond in writing to the Probable Cause Report;
- v. Notification that the respondent has the right to request a Probable Cause Conference, at which the respondent may be present in person and represented by legal counsel or another representative; and
- vi. Any other relevant material or argument.

The PC Report is subject to the following requirements, as excerpted above:

- A copy of the PC Report must be delivered to each respondent, the Executive Director, and any complainant who has alleged retaliation. Reg. 7(B)(2).
- A PC Report must include certain content as described in the box above. Reg. 7(B)(2).

2. Probable Cause Report – Response

PC Report – Response (Enforcement Reg 7(B)(4)): “Each respondent may submit a written Response to the Probable Cause Report. The Response may contain evidence, legal arguments, and any mitigating or exculpatory information. Responses must be delivered to the Executive Director and delivered to all other respondents listed in the probable cause report not later than 21 calendar days following service of the Probable Cause Report.”

3. Probable Cause Report – Rebuttal

PC Report – Rebuttal (Enforcement Reg 7(B)(5)): “The Director of Enforcement may submit evidence or argument in rebuttal to the response. When the Director of Enforcement submits a rebuttal, the Director of Enforcement shall deliver a copy to all respondents not later than 14 calendar days following the date the response was filed.”

4. Whistleblower Complaints

Whistleblower retaliation cases are subject to the following requirements during the PC proceedings:

- Complainants who wish to participate in the PC proceedings must deliver a written request to the Executive Director within 10 calendar days of the PC Report. Reg. 7(B)(3).
- Complainants may provide additional evidence to the Executive Director in response to the PC Report. Reg. 7(B)(3).
- The Executive Director has discretion to set the scope of the complainant’s participation. Reg. 7(B)(3).

B. Probable Cause Conference

Any party (a respondent or the Director Enforcement) may request a Probable Cause Conference (“PC Conference”) before the Executive Director. The PC Conference is an opportunity for each party to present its arguments before the Executive Director makes a finding of probable cause.

1. Delegation To Executive Director

Probable Cause Conferences are conducted by the Executive Director, subject to the following requirements:

- The Commission automatically delegates responsibility for conducting each PC Conference to the Executive Director. Reg. (7)(B)(1).
- The Commission makes the final finding of probable cause (described in further detail below). Reg. 7(B)(1).
- The Executive Director may not recommend a Probable Cause Determination without giving the respondent(s) the opportunity to respond to a PC Report and appear in person at a PC Conference, if appropriately requested. Reg. 7(B)(1).

2. General Procedures

Probable Cause Conferences are subject to the following general procedural rules.

a. Requesting a Conference

PC Conference requests are subject to the following requirements:

- The Executive Director, Director of Enforcement, or any respondent may request a PC Conference. Reg. 7(C)(2).
- A request for a PC Conference must be served on the Executive Director and all other parties no later than 21 calendar days after delivery of the PC Report. Reg. 7(C)(2).
- The Executive Director will set a time for the PC Conference. Reg. 7(C)(2).
- Complainants who allege retaliation may appear at a PC Conference but do not have the right to request a PC Conference. Reg. 7(C)(2).

The Enforcement Regulations are silent on certain issues relating to requesting a Probable Cause Conference:

- There are no requirements for when the Executive Director should schedule a PC Conference.
- There are no requirements for how or when the Executive Director must provide notice to the parties about the date of the PC Conference.

b. Confidentiality

PC Conferences are subject to the following confidentiality requirements:

- PC Conferences are confidential and closed to the public. Reg. 7(C)(1).
- If a respondent requests, and all other respondents agree, a PC Conference may be open to the public. Reg. 7(C)(1).
- After a PC Determination, the PC Report, Response, and Rebuttal will remain confidential unless the PC Conference was public. Reg. 7(C)(1).

c. Recordings and Transcripts

PC Conferences are subject to the following requirements related to recordings:

- PC Conferences must be recorded, and the Director of Enforcement must maintain a copy until the opportunity for legal challenge has been exhausted. Reg. 7(C)(3)(iv).
- Recordings must be provided to any respondent upon request. Reg. 7(C)(3)(iv).
- A respondent may request a certified court reporter to record the Conference. Reg. 7(C)(3)(iv).
 - The respondent must cover the cost of the court reporter. Reg. 7(C)(3)(iv).

- The respondent must provide a copy of the transcript to the Executive Director and any other respondents. Reg. 7(C)(3)(iv).

d. Request for a Translator

PC Conferences are subject to the following requirements related to translators:

- Any party may request a City-approved translator for the PC Conference. Reg. 7(C)(3)(v).
- A request for a translator must be made to the Executive Director at least 20 calendar days before the Probable Cause Conference.
- Per the City’s language ordinance, the Commission will bear the cost of the translation services. Admin Code Section 91.7.
 - The Commission should work with the Office of Civic Engagement and Immigrant Affairs to identify and obtain the services of a qualified and competent translator.

e. Representation

PC Conferences are subject to the following requirements related to representation:

- The PC Conference is an informal proceeding. Reg. 7(C)(3)(i).
- Any respondent may bring legal counsel or another representative. Reg. 7(C)(3)(i).

f. Presentation of Evidence

PC Conferences are subject to the following requirements related to the presentation of evidence:

- Any party must submit a written request to the Executive Director and all parties at least seven calendar days prior to a PC Conference if they wish to present witness testimony. Reg. 7(C)(3)(ii).
- The Executive Director shall consider certain factors when deciding whether to allow testimony:
 - Relevance of proposed testimony;
 - If the witness has a substantial interest in the proceedings; and
 - If fairness requires that the testimony be allowed. Reg. 7(C)(3)(ii).
- Additional evidence may only be submitted during or after the PC Conference if the Executive Director requests such evidence to assist in determining whether there is probable cause. Reg. 7(C)(3)(iii).

3. Determination

After a Probable Cause Conference, the Executive Director will make a recommended finding of probable cause or no probable cause.

a. Standard for Determination

PC Determinations are subject to the following requirements:

- The Executive Director may only recommend a finding of probable cause if “the evidence is sufficient to lead a person of ordinary caution and prudence to believe or entertain a strong suspicion that a respondent committed or caused a violation.” Reg. 7(D)(1).
- A recommendation for finding probable cause does not constitute a finding that a violation has occurred. Reg. 7(D)(1).

b. Finding of Probable Cause

Findings of probable cause are subject to the following requirements:

- A recommended finding of probable cause must be in writing and based solely on the evidence and argument presented in the PC filings and at the PC Conference. Reg. 7(D)(2).
- A recommended finding of probable cause must contain “a summary of all evidence and arguments...and the Executive Director’s assessment of that evidence.” Reg. 7(D)(2).
- The Executive Director must make a determination within 60 calendar days after the later of:
 - The date the PC Report was served;
 - The date the PC Conference was held; and
 - The date the last pleading was received if no PC Conference is held. Reg. 7(D)(5).
- The Executive Director cannot make a determination before a respondent’s deadline to respond to a PC Report. Reg. 7(D)(5).
- The Executive Director must deliver the determination to each respondent and the Director of Enforcement within seven calendar days of making the determination. Reg. 7(D)(5).

c. Finding of No Probable Cause; Written Advice

Findings of no probable cause are subject to the following requirements:

- If the Executive Director does not find probable cause, he or she must issue a finding of no probable cause in writing with “clear and concise” reasoning. Reg. 7(D)(3).
- A finding of no probable cause (once ratified by the Commission) represents a final decision and the end of the administrative process. Reg. 7(D)(7).
 - A complainant must follow the procedures for judicial review of a final administrative order in the California Code of Civil Procedure if they wish to seek additional review. Reg. 7(D)(7).
- The Executive Director will issue a finding of no probable cause if respondent(s) provide “clear and convincing evidence” that formal written advice was obtained from the Ethics Commission that advised the respondent’s conduct was lawful and meets the requirements listed in the Enforcement Regulations. Reg. 7(D)(8).

d. Default Order (PC)

Default Orders finding probable cause are subject to the following requirements:

- If the Director of Enforcement followed all notice procedures and any respondents failed to appear at the PC Conference, the Executive Director may recommend a finding of probable cause against that respondent(s). Reg. 7(D)(4).
 - The Director of Enforcement bears the burden of proving proper notice. Reg. 7(D)(4).

C. Commission Ratification

The Commission has an opportunity to request a review of the Executive Director’s recommended Probable Cause Determination and can thereafter choose whether to ratify the recommendation.

1. Commissioner Requests for PC Review

Ratification - General (Enforcement Reg 7(D)(6)): “Upon finalizing her recommended probable cause determination, the Executive Director will inform the Commission of that determination on or before close of business the following business day. Thereafter, any member of the Commission may request review of the Executive Director’s recommended probable cause determination by the full Commission in closed session at the next regularly scheduled Commission meeting. A Commissioner’s request that a probable cause determination be calendared for consideration by the full Commission must be received by the Executive Director within 5 calendar days of the Executive Director’s notification.”

No PC Review (Enforcement Reg 7(D)(6)(ii)): “If no Commissioner requests review of the Executive Director’s recommended probable cause determination, then the Commission has ratified the Executive Director’s recommended probable cause determination, and the Executive Director will publish the formal Probable Cause Determination by delivering it to the parties and posting it to the Commission’s website.”

Commission ratification is subject to the following general requirements:

- The Executive Director must inform the Commission of a recommended Probable Cause Determination by close of business the following business day. Reg. 7(D)(6).
- Any Commissioner may request review of a recommended Probable Cause Determination by the full Commission in closed session at the next regularly scheduled meeting. Reg. 7(D)(6).
 - A request for review of a Determination must be received by the Executive Director within five calendar days of the Executive Director’s notification to the Commission. Reg. 7(D)(6).
- If no Commissioner requests review by the deadline, the Commission has ratified the recommended Probable Cause Determination. Reg. 7(D)(6)(ii).
 - If the Commission ratifies the Determination, the Executive Director must publish the formal Determination by delivering the full written report to the parties and posting it to the Commission’s website. Reg. 7(D)(6)(ii).

The Enforcement Regulations are silent on certain issues relating to publication of a Probable Cause Determination:

- There is no deadline for when the Executive Director must publish the ratified Probable Cause Determination to the Commission’s website.
- There is no deadline for when the Executive Director must deliver notice of the ratified Probable Cause Determination to the parties.

2. Commission Review of Executive Director’s Recommended Probable Cause Determination

PC Review (Enforcement Reg 7(D)(6)(i)): “If any Commissioner requests review of the Executive Director’s recommended probable cause determination, then the determination is not final until at least three members of the Commission agree to ratify it at the next regularly scheduled Commission meeting. The Commission must consider the Executive Director’s recommendation in closed session and may hear argument from the Director of Enforcement or the respondent(s). The parties will not be given additional opportunity to provide written argument to the Commission.”

Formal Commission review of a recommended Probable Cause Determination is subject to the following requirements:

- If any Commissioner requests review of a recommended Probable Cause Determination by the deadline, then the Commission must consider the recommendation in closed session at its next regularly scheduled meeting. Reg. 7(D)(6)(i).
- During closed session review, the Commission may hear argument from the Director of Enforcement or respondent(s). Reg. 7(D)(6)(i).
 - Parties will not have an opportunity to provide additional written argument to the Commission for closed session review. Reg. 7(D)(6)(i).
- Once a review of the recommended Probable Cause Determination has been requested, the determination is not final until the Commission ratifies it by a majority vote of three Commissioners. Reg. 7(D)(6)(i).
- The Commission must review the Executive Director’s recommended determination of probable cause using the standard for probable cause: whether “the evidence is sufficient to lead a person of ordinary caution and prudence to believe or entertain a strong suspicion that a respondent committed or caused a violation” Reg. 7(D)(1).
- Commissioners are prohibited from “engaging in oral or written communications regarding the merits of a complaint or enforcement action with any person or entity” prior to a final determination on the merits. Reg. 9(A)(2).

II. Preliminary Matters

Following the issuance of the accusation in the form of a Probable Cause Determination, the resolution of preliminary matters is the first stage of the administrative hearing process. This must happen prior to the actual Hearing on the Merits, which will be covered in Part III. This section seeks to explain the provisions of the Enforcement Regulations regarding the resolution of preliminary matters and the role of the Commission in the administration of preliminary matters. Where the Enforcement Regulations do not fully explain the process for resolving an issue, or are silent regarding such a process, this Guidebook identifies such areas, describes the issues that need to be resolved, provides options available to resolve the matter, and provides a recommendation that Staff believes will best assist the Commission in making its decision. In addition to the Enforcement Regulations, this Guidebook section also relies on the provisions of the California Code of Administrative Procedure (“CA APA”), which is referenced in the Enforcement Regulations in certain areas, and the San Francisco Campaign and Governmental Conduct Code.

A. Preliminary Matters – Who Decides

The Enforcement Regulations provide for the Commission to delegate authority to preside over preliminary matters to a member of the Commission (an “Assigned Commissioner”) or to an outside hearing officer.¹ The Assigned Commissioner has authority to make procedural determinations, and the Commission, upon request, may review those procedural determinations.

Delegation of Preliminary Matters (Enforcement Reg 8(A)(1)):

“When an individual Commissioner or a hearing officer is assigned to hear and decide preliminary matters in advance of a hearing on the merits, he or she will make an actual determination. Procedural determinations may be reviewed by the Commission upon request by the Executive Director or a respondent.”

The Enforcement Regulations are silent on certain issues relating to the delegation of authority over preliminary matters to an Assigned Commissioner:

¹ Although the Commission has the option to delegate all preliminary matters to an outside hearing officer, for simplicity this guide will assume that the Commission delegates this role to a member of the Commission (an “Assigned Commissioner”). Note that the duties of the Assigned Commissioner discussed in this section could also be assigned to an outside hearing officer.

Delegation to an Assigned Commissioner: The Commission must decide on who will preside over preliminary matters. The Commission may choose any of the following options:

1. Assign an individual member of the Commission as Assigned Commissioner to hear and decide preliminary matters, while the Commission retains its authority to preside over the Hearing on the Merits **(Recommended)**;
2. Assign an individual member of the Commission as Hearing Officer to preside over the Preliminary Matters and the Hearing on the Merits;
3. Appoint any licensed attorney as a Pre-hearing Officer to preside over preliminary matters, while the Commission retains its authority to preside over the Hearing on the Merits;
4. Appoint any licensed attorney as Hearing Officer to preside over both the preliminary matters and the Hearing on the Merits; or
5. The full Commission presides over preliminary matters in public session prior to the Hearing on the Merits and then presides over the Hearing on the Merits.

****Note: If the Commission delegates preliminary matters to an Assigned Commissioner, at that time, the Commission should also decide on certain items that will govern how the Assigned Commissioner will resolve preliminary matters. These items are discussed below, but are listed here for convenience:***

- The timeline for delegation to an Assigned Commissioner after a PC Determination has been made.
- The timeline for the resolution of preliminary matters after a Commissioner is assigned.
- The deadline for the issuance of the Assigned Commissioner's determination.
- The format of the Assigned Commissioner's determination (verbal or oral).
- The process for delivery of the Assigned Commissioner's determination.
- The process for review of the Assigned Commissioner's determination if a request for review is made by a party.

Timeline for Delegation to an Assigned Commissioner: If the Commission decides to delegate the resolution of preliminary matters to an Assigned Commissioner, the Commission must do so *upon majority approval*, which means by a vote in the affirmative of at least 3 members of the Commission.

Thus, the Commission would need to schedule the vote to approve the delegation. Options the Commission may consider for scheduling the vote include:

1. Delegate to an Assigned Commissioner at the next Commission meeting immediately following the publication of the Executive Director's Probable Cause Determination. **(Recommended)**
2. Delegate to an Assigned Commissioner at the same Commission meeting during which a ratification occurs (if the Executive Director's recommended determination was subject to review at a Commission Meeting).
3. Delegate to an Assigned Commissioner at a future Commission meeting, at the call of the Chair.

Role of the Assigned Commissioner

The Enforcement Regulations contemplate that the Assigned Commissioner will hear and decide all preliminary matters but are silent on some aspects of the process. Although the Enforcement Regulations list various types of preliminary matters that may require resolution ahead of the Hearing on the Merits under section 8(F), and state that parties may request consideration and resolution of such matters during a given timeframe, the Enforcement Regulations are not clear regarding the exact nature and scope of these preliminary matters and the exact process through which the preliminary matters must be heard. The following two sections address the nature and scope of preliminary matters and the process for deciding them.

B. Preliminary Matters – Nature and Scope

Preliminary matters are matters that need to be addressed and resolved before a case proceeds to a full Hearing on the Merits.

Preliminary Matters (Enforcement Reg 8(F): “Any party may request formal consideration of preliminary matters by delivering to the assigned Commissioner, or hearing officer a motion setting forth relevant facts, law, and argument. Preliminary matters may include, but are not limited to, the following:

1. Procedural matters;
2. Disqualification of any member of the Commission from participation in the hearing on the merits;
3. Requests for dismissal of any charges in the Probable Cause Determination because, even if the allegations set forth in the Determination are true, as a matter of law those charges do not state a violation of law as alleged;
4. Discovery motions; and
5. Any other matters not related to the truth or falsity of the factual allegations in the Probable Cause Determination.”

1. Procedural Matters

The Enforcement Regulations do not provide a definition for “procedural matters.” However, the Regulations do contemplate that the following matters will require some form of resolution. Note that these matters are discussed in greater depth, including possible options and recommendations, in the later section on Hearings on the Merits. Procedural matters may include:

- Scheduling:
 - The schedule, timeframe, and location for resolving any motion raised by parties.
 - The schedule, timeframe, and location of the Hearing on the Merits.
- Filings
 - The procedure for submission, filing, or service of a document.
- Discovery
 - The procedure for discovery, including witness and document subpoenas.
 - Rulings regarding the issuance of subpoenas and discovery orders.
- Witnesses

- The identity and number of witnesses.
- The procedure for witness exclusion and the standard that should be applied in the decision to exclude a witness.
- The procedures for examination of witnesses.
- Exhibits
 - The order of presentation of evidence, generally.
 - The procedure for introduction and standard of admissibility of exhibits.
 - The procedure for submissions of stipulated exhibits in the Hearing on the Merits.
- Format
 - The order of presentation of evidence, cross examination, and rebuttal.
- Other such matters as will facilitate the orderly and smooth conduct of the hearing on the merits, including the general Commission practice, as provided in the Enforcement Regulations, for recording of a hearing when a default order is warranted.

2. Disqualification of Commissioners

The Enforcement Regulations do not provide criteria or a standard for disqualification of Commissioners. There are existing City Ethics laws that govern the process for disqualification of City Officers when they are prohibited from making or participating in making a governmental decision, which includes a Hearing on the Merits. Additionally, there are rules that govern the public disclosure of certain relationships an officer or employee may have with a person who is the subject of a matter before the officer or employee. There are also disqualification protocols established under the CA APA.

San Francisco Campaign and Governmental Conduct Code (SFC&GCC) Section 3.206 (a): “No officer or employee of the City and County shall make, participate in the making, or seek to influence a decision of the City and County in which the officer or employee has a financial interest within the meaning of California Government Code Section 87100 et seq. and any subsequent amendments to these Sections.”

SFC&GCC Section 3.214: “A City officer or employee shall disclose on the public record any personal, professional or business relationship with any individual who is the subject of or has an ownership or financial interest in the subject of a governmental decision being made by the officer or employee where as a result of the relationship, the ability of the officer or employee to act for the benefit of the public could reasonably be questioned.”

CA APA Section 11512(c): “An administrative law judge or agency may disqualify himself or herself and withdraw from any case in which there are grounds for disqualification, including disqualification under section 11425.40. The parties may waive the disqualification by a writing that recites the grounds for disqualification. A waiver is effective only when signed by all parties, accepted by the administrative law judge or agency member, and included in the record. Any party may request the disqualification of any administrative law judge or agency member by filing an affidavit prior to the taking of evidence at a hearing, stating with particularity, the grounds upon which it is claimed that the administrative law judge or agency member is disqualified. Where the request concerns an agency member, the issue shall be determined by the other members of the agency. Where the request concerns the administrative law judge, the issue shall be determined by the agency itself if the agency hears the case with the administrative law judge, otherwise, the issue shall be determined by the administrative law judge. No agency member shall withdraw voluntarily or be subject to disqualification if his or her disqualification would prevent the existence of a quorum qualified to act in the particular case, except that a substitute qualified to act may be appointed by the appointing authority.”

CA APA Section 11425.40(a): “...a presiding officer is subject to disqualification for bias, prejudice, or interest in the proceeding.”

Disqualification of Commission Members: Disqualification will be required under the provisions of section 3.206 as described above. Additionally, if a party moves for the disqualification of a Commissioner, either the Assigned Commissioner or the full Commission shall consider the following factors when deciding whether to order a recusal:

1. Financial conflict of interest under section 3.206 of the SFC&GCC: here, a Commissioner is disqualified and must recuse from a matter if a Respondent is a financial interest to the Commissioner. Such Commissioner must follow the recusal procedures under section 3.209 of the SFC&GCC and file the recusal form with the Ethics Commission. This recusal is mandatory.
2. Personal, business, or professional relationship with the Respondent under section 3.214 of the SFC&GC: here, a Commissioner may, but is not required, to recuse from the matter. **(Recommended in addition to mandatory recusal in #1 above).**
3. Disqualification for bias, prejudice or interest in the proceeding as provided in the APA.

Notification of Recusal: Staff recommend that to avoid any delay in the process, where a Commissioner has reason to recuse from a matter, the Commissioner should immediately notify the Chair, who should then notify the Executive Director, Director of Enforcement and Respondent. Additionally, the Commissioner should not discuss the matter with anyone and should not be present in the hearing room whenever the matter is being discussed. Finally, the Commissioner must follow the recusal procedures under section 3.209 of the SFC&GCC.

3. Requests for Dismissal

The Enforcement Regulations do not explain the nature or process for requests made to the Assigned Commissioner to dismiss a case, other than that such requests may be based on an argument that “even if the allegations set forth in the Determination are true, as a matter of law those charges do not state a violation of law as alleged.” Reg. 8(F)(3). A request for dismissal would likely be an opportunity for a respondent to argue for dismissal based on new legal theories not already raised through the Probable Cause process or new evidence discovered after a Probable Cause Determination was already made.

4. Discovery Motions and Subpoenas

a. Discovery Motions

The Enforcement Regulations provide for a process of discovery, which is to be overseen by the Assigned Commissioner.

Pre-Hearing Discovery (Enforcement Reg 8(D)): “The Executive Director and each respondent will be entitled to pre-hearing discovery in accordance with the provisions of the California Administrative Procedure Act, Government Code, Title 2, Division 3, Part 1, Chapter 5, section 11500 et seq.”

Discovery Rules (California Administrative Procedure Act, Cal. Gov't Code § 11507.6): "After initiation of a proceeding in which a respondent or other party is entitled to a hearing on the merits, a party, upon written request made to another party, prior to the hearing and within 30 days after service by the agency of the initial pleading or within 15 days after service of an additional pleading, is entitled to (1) obtain the names and addresses of witnesses to the extent known to the other party, including, but not limited to, those intended to be called to testify at the hearing, and (2) inspect and make a copy of any of the following in the possession or custody or under the control of the other party:

(a) A statement of a person, other than the respondent, named in the initial administrative pleading, or in any additional pleading, when it is claimed that the act or omission of the respondent as to this person is the basis for the administrative proceeding;

(b) A statement pertaining to the subject matter of the proceeding made by any party to another party or person;

(c) Statements of witnesses then proposed to be called by the party and of other persons having personal knowledge of the acts, omissions, or events which are the basis for the proceeding, not included in subdivision (a) or (b) above;

(d) All writings, including, but not limited to, reports of mental, physical, and blood examinations and things which the party then proposes to offer in evidence;

(e) Any other writing or thing which is relevant and which would be admissible in evidence;

(f) Investigative reports made by or on behalf of the agency or other party pertaining to the subject matter of the proceeding, to the extent that these reports (1) contain the names and addresses of witnesses or of persons having personal knowledge of the acts, omissions, or events which are the basis for the proceeding, or (2) reflect matters perceived by the investigator in the course of their investigation, or (3) contain or include by attachment any statement or writing described in subdivisions (a) to (e), inclusive, or summary thereof."

Discovery is subject to the following rules under the CA APA:

- The respondent or any party may request discovery of the information described above by written request to another party within 30 days of the delivery of the accusation (ratified Probable Cause Determination) by the Executive Director.
- The respondent may also request discovery of the information described above by written request to another party within 15 days of service of any additional pleadings.

Privilege and Confidentiality in Discovery (Cal Gov't Code § 11507.6): "Nothing in this section shall authorize the inspection or copying of any writing or thing which is privileged from disclosure by law or otherwise made confidential or protected as the attorney's work product."

Scope of Discovery: The Appointed Commissioner may need to decide whether something is within the scope of discovery under the California Administrative Procedure Act and whether it is privileged or confidential and not subject to discovery. The Appointed Commissioner may seek the advice of the City Attorney's Office in determining whether a document is privileged or confidential.

b. Issuance of Subpoenas

The Enforcement Regulations state that the Appointed Commissioner has the authority to issue subpoenas during the course of determining preliminary matters prior to a Hearing on the Merits. Also, as outlined under the "Procedural Matters" section above, matters related to discovery, including witness and document subpoenas and rulings regarding the issuance of subpoenas and discovery orders, should be decided by the Assigned Commissioner at the preliminary matters stage.

Subpoenas Enforcement Reg 8(D)(1): "The Commissioner or hearing officer assigned to decide preliminary matters will be authorized to provide for the issuance of subpoenas. The Executive Director and any respondent named in the Finding of Probable Cause may request the issuance of subpoenas to compel the attendance of witnesses and production of documents at the hearing on the merits. Requests for the issuance of subpoenas should be delivered no later than 20 calendar days prior to the commencement of a hearing on the merits. The request will be accompanied by a declaration specifying the name and address of the witnesses and setting forth the materiality of their testimony. If the request is for a document subpoena, it will be accompanied by a declaration which includes the following information: a specific description of the documents sought; an explanation of why the documents are necessary for the resolution of the complaint; and the name and address of the witness who has possession or control of the documents. Subpoenas may be issued upon approval of the Commission or the hearing officer."

Subpoenas are subject to the following rules under the Enforcement Regulations:

- The Assigned Commissioner will have the authority to issue subpoenas.
- The Executive Director or respondent may request the issuance of subpoenas to compel attendance of a witness or the production of documents at the Hearing on the Merits.
- Any request must be made no later than 20 calendar days prior to the commencement of the Hearing on the Merits.
- A request for documents subpoena must be accompanied by a declaration explaining why the documents are necessary.

- Subpoenas may be issued upon approval by the Commission or the Assigned Commissioner.

Request for Issuance of Subpoenas: The Enforcement Regulations provide that parties may request the issuance of subpoenas within any time from the publication of the Probable Cause Determination up to no later than 20 calendar days prior to the commencement of the Hearing on the Merits. However, this timeline does not account for the time that may be needed to adjudicate and rule on any matters related to the subpoena request. Any challenges to a subpoena request or failure to comply with a subpoena request may ultimately result in a delay in the commencement of a Hearing on the Merits. The Commission has the option to:

1. Follow the timeline for the request for issuance of subpoenas provided under the Enforcement Regulations:
 - Request for issuance of subpoena would be due 20 calendar days prior to the Hearing on the Merits commencement date, or
2. Follow the discovery timeline as set out under the CA APA (Cal Gov. Code §11507.6) for all matters related to discovery (**Recommended**):
 - Initial request for issuance of subpoena would be due within 30 calendar days after ratification of the Probable Cause Determination/Accusation.
 - Subsequent request for issuance of subpoena would be due within 15 calendar days of the issuance of any additional pleading.

In considering which option to follow, it should be noted that even though the Enforcement Regulations provide the 20 calendar day timeline for the submission of requests for subpoenas, they also state that parties will be entitled to pre-hearing discovery in accordance with the provisions of the California Administrative Procedure Act.

5. Other Matters not related to truth or falsity of allegations

The scope of this final catchall category of preliminary matters is not further defined. The Commission may choose to consider additional items as preliminary matters at its discretion.

C. Process for Resolving Preliminary Matters

Determination on Preliminary Matters (Enforcement Reg 8(A)(1)): “When an individual Commissioner or a hearing officer is assigned to hear and decide preliminary matters in advance of a hearing on the merits, he or she will make an actual determination. Procedural determinations may be reviewed by the Commission upon request by the Executive Director or a respondent.”

The Enforcement Regulations do not specify a timeline for when preliminary matters should be resolved. Before a matter proceeds to an Assigned Commissioner, the Commission should determine how much time should be allowed for the resolution of preliminary matters.

Process for Initiating the Resolution of Preliminary Matters: Within the set timeframe of being assigned to a matter, the Assigned Commissioner should initiate preliminary proceedings. Options for doing so include:

1. Notice to of Assignment to Parties [within a set number of calendar days of being assigned]
 - Via email (**Recommended**)
 - Via phone
 - Via mail
2. The Notice should contain the following:
 - The name of the Commissioner Assigned to the case.
 - The deadline for submission of any motions for formal request for consideration or resolution of pre-hearing matters.
 - The rule regarding continuance or extensions of time for motion submissions.

The resolution of preliminary matters has three steps: (1) a motion for consideration of a preliminary matter by a party, (2) the actual determination of the preliminary matter by the Assigned Commissioner; and, potentially, (3) the review of the Assigned Commissioner’s decision by the Commission upon request by the Executive Director or a Respondent. Section 8(F) of the Enforcement Regulations sets out the process for requesting a resolution of preliminary matters.

1. Motion to Request Consideration of a Preliminary Matter

Request for Resolution of Preliminary Matters Via Motion (Enforcement Reg 8(F)): “A request for resolution of preliminary matters must be delivered to the Commission or hearing officer no later than 15 calendar days prior to the commencement of a hearing on the merits. Responses are due 10 calendar days prior to the hearing on the merits, and replies are due 7 calendar days prior to the hearing on the merits. When the request, response, or reply is delivered to the Commission or hearing officer, the requester must deliver copies of the request to the Executive Director and every other respondent(s).”

When a party submits a motion for resolution of a preliminary matter to the Assigned Commissioner, the motion must set forth relevant facts, law, and argument.

Timing of Submissions of Motions, Responses, and Replies: The timeline for preliminary matter motions provided under section 8(F) of the Enforcement Regulations states that motions are due “15 calendar days prior to the commencement of a Hearing on the Merits.” This timeframe does not provide sufficient time for the resolution of preliminary matters, including responses, replies, and determinations, before the commencement of the Hearing on the Merits. It also does not provide sufficient time for review by the Commission in the event that a request for review is made either by the Executive Director or a respondent. Additionally, the date for the Hearing on the Merits may be unknown at the point when preliminary matters are being adjudicated, so the actual submission deadlines as provided in the Enforcement Regulations might be unknown to all parties.

Timing of Submissions of Motions: The deadline for the submission of motions should be resolved at the beginning of the preliminary matters stage. The options the Commission may consider include:

1. The Assigned Commissioner sets a new deadline for the submission of preliminary matter motions upon being assigned to the matter (**recommended**):
 - Formal Requests due by date set by Assigned Commissioner
 - Response due five calendar days after Request is submitted.
 - Reply due three calendar days after the Response is submitted.

2. The Commission retains timeline set under the Enforcement Regulations:
 - Formal Requests due 15 calendar days prior to the hearing on the merits.
 - Response due ten calendar prior to hearing on the merits.
 - Reply due seven calendar days prior to the hearing on the merits.

If a request for formal consideration is made via motion, the Assigned Commissioner should schedule a conference with parties to resolve the matters raised. The conference should be scheduled for a date after the deadline for the last filing.

2. Determination of Preliminary Matters

The Enforcement Regulations are silent on the process for resolving preliminary matters once a motion is made and responses and replies, if any, are submitted. Section 8(A)(1) of the Enforcement Regulations provides that if a Commissioner is assigned, he or she will make an actual determination subject to review by the Commission. Thus, if an Assigned Commissioner presides over preliminary matters and makes any decisions regarding those issues, such decisions may be reviewed by the Commission upon request by the Executive Director or a respondent. However, the Enforcement Regulations do not prescribe any particular format by which the Assigned Commissioner's determination should be issued.

Process for Actual Determination on Preliminary Matters: The Commission must resolve when and how the Assigned Commissioner's determination should be issued upon conclusion of the preliminary matters. The issues that need to be resolved include:

1. The deadline for the issuance of the Assigned Commissioner's determination on preliminary matters. Options include:
 - Within five calendar day following the Assigned Commissioner's resolution of preliminary matters. **(Recommended)**.
 - At the next regularly scheduled Commission meeting following the Assigned Commissioner's resolution of preliminary matters.
2. The format of the Assigned Commissioner's determination on preliminary matters. Options include:
 - Written determination **(Recommended)**.
 - Verbal determination.
3. The process for delivery of the Assigned Commissioner's determination on preliminary matters. Options include:
 - Email determination to Commissioners, the Executive Director, Director of Enforcement, and Respondent. **(Recommended)**.
 - Send determination via mail as provided under section 8(H) of the Enforcement Regulations.
4. Extensions of Time: the Enforcement Regulations are silent regarding the extension of deadlines as it relates to preliminary matters. It is unclear whether any extensions should be entertained, including for the submission of preliminary motions or other filings at the preliminary matters stage. The Commission may consider the following options:
 - **Enforcement Reg 9(A)(10):** These provisions address extensions of time and continuances at the hearing on the merits stage. The Commission may adopt or shorten the timeframe for the preliminary stage.
 - **Cal Gov't Code § 11524(a):** These provisions of the Cal APA provide no absolute right to a continuance; instead, the agency has discretion to grant a continuance and an ALJ or the presiding judge may grant a continuance for good cause. See *Bussard v DMV* (2008) 164 CA4th 858, 865 (court found good cause existed to grant continuance to allow deputy to testify).

3. Commission Review of Assigned Commissioner's Determination

Section 8(A)(1) of the Enforcement Regulations provides that preliminary matter determinations may be reviewed by the Commission upon request by the Executive Director or a respondent. The Enforcement Regulations are silent regarding the timeline for delivery of a request for review by parties, the process for conducting such review, and the standard or protocols the Commission should follow in conducting the review.

Commission Review of Assigned Commissioner's Determination: The Commission may consider the following options in deciding how to proceed with the review process:

- a. Adopt a review process similar to the Probable Cause ratification review as described in section 7(D)(6) of the Enforcement Regulations. However, in this case, the request for review will come from either the Executive Director or the Respondent. **(Recommended)**. The process would include the following rules:
 - Request for review must be delivered within five calendar days following the issuance of the Assigned Commissioner's determination.
 - Review will take place at the next regularly scheduled Commission meeting.
 - Parties will be permitted to provide oral arguments, but no additional written arguments will be allowed.
 - The full Commission will decide the issue by a majority vote. If a majority vote does not overturn the Assigned Commissioner's actual determination, the determination is final.
 - The matter will then proceed to a full hearing on the merits.
- b. Create a different review process that allows the Commission to hear and rule on the issues raised by the requesting party.
- c. To prevent unnecessary delay and to avoid wasting resources on minor procedural matters, the Commission may review any issues raised when the matter appears before the full Commission at the Hearing on the Merits, prior to the commencement of the Hearing on the Merits.

Whatever process the Commission adopts, the following steps would also be required:

- Assigned Commissioner delivers the determination on preliminary matters to the full Commission and all parties within a given timeframe after the conclusion of the preliminary matters.
- Any Party who requests a review must deliver the request to the Commission within a given timeframe following the Assigned Commissioner's determination.
- The request for review must clearly identify the issue(s) for which the party is seeking review.
- The Commission sets the matter to be reviewed at the next regularly scheduled Commission meeting.
- The Commission would also have to decide whether the parties may submit written arguments in support of the request at the time the request is made and, if so, the amount of time the opposing party would be permitted to submit a written response to the request ahead of the Commission's review.

D. Hearing Brief and Setting Date of the Hearing of the Merits

1. Submission of Hearing Briefs

The Enforcement Regulations require the Executive Director to submit a Hearing Brief and allow for any respondent to submit a response brief. The Executive Director may also submit a rebuttal brief.

Hearing Brief (Enforcement Reg 8(E)): “The Executive Director will, and any respondent may, submit a hearing brief. The briefs will outline significant legal arguments and list evidence and witnesses to be presented at the hearing and may attach anticipated evidence, including documents and declarations. The briefs are not required to list anticipated rebuttal evidence or rebuttal witnesses. For page limitations and formatting requirements, see Section 6 of these regulations. Unless the Commission or outside hearing officer agrees to accept briefs by email, six copies of Staff’s Hearing Brief will be delivered to the Commission, assigned Commissioner, or outside hearing officer and all parties to the proceeding no later than 30 calendar days prior to the date the hearing on the merits commences. The respondent(s)’ responsive brief will be due no later than 15 calendar days prior to the date the hearing on the merits commences, and Staff’s rebuttal brief will be submitted no later than 5 calendar days prior to the date the hearing on the merits commences.”

The Hearing Brief is subject to the following rules regarding format and submissions:

- Only the Executive Director is required to submit a Hearing Brief.
- The Hearing Brief must include legal arguments, evidence, and witnesses to be presented at the Hearing on the Merits.
- The Hearing Brief must be submitted no later than 30 calendar days prior to the date that the Hearing on the Merits commences, while the Response is due no later than 15 calendar days, and the Reply due no later than five calendar days prior to the date the Hearing on the Merits commences.
- Six copies of the Hearing Brief must be delivered to the Commission, assigned Commissioner or outside hearing officer and all parties.

2. Setting the Date of the Hearing on the Merits

The Enforcement Regulations place the responsibility for setting the date of the Hearing on the Merits with the Executive Director. This can be done at any time after the Commission's ratification of probable cause. Respondents must receive at least 30 days' notice.

Hearing on the Merits: Notice and Date Setting (Enforcement Reg 8(B)) "The Executive Director will schedule the hearing on the merits, and deliver written notice of the date, time, and location of the commencement of the hearing, to each respondent at least 30 calendar days prior to the commencement of the hearing. The notice will be in substantially the following form:

"You are hereby notified that a hearing will be held before the Ethics Commission (or name of hearing officer or assigned Commissioner) at ___ on the __ day of __, 20__, at the hour of __, at (location of _____), upon the charges made in the Finding of Probable Cause. You may be present at the hearing and may, but need not, be represented by counsel or another representative. You may also present any relevant evidence, and you will be given an opportunity to cross-examine all witnesses testifying against you. You may request the issuance of subpoenas to compel the attendance of witnesses and the production of records, documents, or other things by applying to the Commission on or before (date)."

Hearing on the Merits: Notice and Date Setting: The Executive Director should consider the following when setting the date for the Hearing on the Merits:

1. The date of the Hearing on the Merits should allow sufficient time to address any preliminary matters. The timeline for preliminary matters established by the Commission should give an indication of when preliminary matters will be completed. (See Section II.C above)
2. The date should give the parties sufficient time to submit their briefs, which are due 30 days (hearing brief), 15 days (response brief), and five days (rebuttal brief) before the Hearing on the Merits. (See Section II.D.2 below). In practice, this will require the Executive Director to set the date of the hearing with more than 30 days' notice, which is all that the regulations require.

III. Hearing on the Merits

A Hearing on the Merits (“Hearing”) is a formal proceeding to resolve whether or not a respondent has violated the laws administered by the Commission. The Hearing presents an opportunity for the parties to present their case through oral argument, exhibits, and witnesses and for the Commission to determine whether a violation has occurred based on the evidence presented. If the Commission determines a violation has occurred, it must then determine the appropriate remedy.

A. Hearing – Who Decides

The Enforcement Regulations give the Commission the option to serve as a Hearing panel or appoint an individual Hearing Officer for each Hearing.

Hearing Panel (Enforcement Reg 8(C)): “Following the issuance of a Finding of Probable Cause by the Executive Director, the Commission will proceed with a hearing on the merits of the complaint. Unless otherwise decided by the Commission pursuant to Section 7(A), the Commission will sit as the hearing panel to hear the merits of the case.”

Hearing Officer (Enforcement Reg 8(A)): “Upon majority approval, the Commission may delegate authority to preside over a hearing on the merits to a hearing officer. Any licensed attorney in the state of California or individual member of the Commission may serve as a hearing officer.”

Hearing Officer: The Commission must decide prior to the commencement of a Hearing on the Merits whether to appoint a Hearing Officer to preside over the Hearing on the Merits. Options include:

- No Hearing Officer (the Commission as a whole serves as the Hearing panel)
- An individual Commissioner appointed as Hearing Officer
- A non-Commissioner appointed as Hearing Officer (can be any licensed attorney)

B. General Hearing Protocols

The Enforcement Regulations include protocols that apply generally to Hearings.

1. Charging Document

Charging Document (Enforcement Reg 9(A)(1)): “The Probable Cause Determination will be the charging document for the hearing on the merits.”

2. Public Hearings

Public Hearings (Enforcement Reg 9(A)(2)): “The hearing on the merits will be open to the public, provided that either the Executive Director or the respondent(s) may request that the Commission, assigned Commissioner or hearing officer exclude any parties’ witnesses from being present during the hearing at which they are not providing testimony. Commissioners are prohibited, prior to a final determination on the merits of a complaint, from engaging in oral or written communications regarding the merits of a complaint or enforcement action with any person or entity. After a final determination on the merits of a complaint, Commissioners may discuss matters in the public record.”

Hearings are subject to the following rules regarding the public:

- All Hearings must be open to the public. Reg. 9(A)(2).
- Any party may request the exclusion of any witness from being present during the Hearing while they are not providing testimony. The Commission or the Hearing Officer must rule on this request. Reg. 9(A)(2).
- Commissioners may not engage in “oral or written communications regarding the merits of a complaint or enforcement action with any person or entity” prior to a final determination on the merits. After a final determination, Commissioners “may discuss matters in the public record.” Reg. 9(A)(2).

The Enforcement Regulations are silent regarding witness exclusion at the public Hearing on the Merits. The Commission must resolve this question during the preliminary matters stage. **The Enforcement Division recommends that the Commission delegate a determination on the following issues to the Assigned Commissioner in each matter:**

Witness Exclusion

1. What standards should be applied in the decision to exclude a witness.
Options include:
 - Good cause, as applied to Commission decisions on continuance and extension requests **(Recommended)**
 - Other standard, to be determined by the Commission

3. Request for Translator

Request for Translator (Enforcement Reg 9(A)(5)): “Any party may request the presence of a City-approved translator for the Hearing on the Merits. The request must be made to the Executive Director in writing at least 20 calendar days before the Hearing on the Merits, and the requesting party must deliver a copy of the request to all of parties at the same time they submit the request to the Executive Director.”

Hearings are subject to the following rules regarding translators:

- Any party may request a City-approved translator at the Hearing by delivering the request to the Executive Director in writing at least 20 calendar days before the hearing. Reg. 9(A)(5).
- The requesting party must deliver a copy of the request to all parties. Reg. 9(A)(5).
- Per the City’s language ordinance, the Commission will bear the cost of the translation services. Admin Code Section 91.7.
 - The Commission should work with the Office of Civic Engagement and Immigrant Affairs to identify and obtain the services of a qualified and competent translator.

4. Recording

Recordings (Enforcement Reg 8(G)): “Every hearing on the merits will be recorded digitally. The Commission will retain the tapes until the opportunity for legal challenge has been exhausted. Copies of a tape will be available upon request.”

The Enforcement Regulations are silent on some issues relating to recordings. These issues should be resolved during the preliminary matters stage. **The Enforcement Division recommends that the Commission delegate a determination on the following issues to the Assigned Commissioner in each matter:**

Recordings

1. Who will be responsible for ensuring that a recording is made and distributed to any parties that request it. Options include:
 - a. Commission Staff (**Recommended**)
 - b. Hearing Officer

5. Rules of Evidence

Evidence (Enforcement Reg 9(A)(4)): “All evidence admissible in an administrative proceeding governed by the California Administrative Procedure Act will be admissible in a hearing on the merits. The Executive Director and each respondent will have the right to call and examine witnesses under oath or affirmation, to introduce exhibits, to cross-examine and impeach witnesses, and to rebut any evidence presented.”

California APA Evidence Guidance: Any “relevant evidence” shall be admitted if it is the sort of evidence on which “responsible persons are accustomed to rely in the conduct of serious affairs,” regardless of formal evidence rules. Cal APA Sec. 11513(c).

Hearings are subject to the following rules as found in the Enforcement Regulations, the California Rules of Evidence, and the California Administrative Procedure Act:

- All evidence admissible in an administrative proceeding under the California APA is admissible during a Hearing before the Commission. Reg. 9(A)(4).
 - Formal evidence rules do not apply in Commission Hearings. A simpler set of evidence rules apply. Reg. 9(A)(4); Cal. APA Sec. 11513(c).
 - Relevant evidence is any evidence “having any tendency to prove or disprove any disputed fact that is of consequence to the determination of the action.” Cal. Evidence Code, Div. 2 – 210.
 - Hearsay evidence, defined as any evidence taken outside the hearing room, may be used to support other evidence but may not be used alone to support a finding of fact. Cal. APA Sec. 11513(d).
 - The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing. Cal. APA Sec. 11513(e)
 - The Commission (or Hearing Officer) has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time. Cal. APA Sec. 11513(f).
- Commission Staff and each respondent may call and examine witnesses, introduce exhibits, cross-examine and impeach witnesses, and rebut any evidence presented. Reg. 9(A)(4). Cal. APA Sec. 11513(b).
- Oral evidence shall be taken only on oath or affirmation. Cal. APA Sec. 11513(a).

The Enforcement Regulations are silent on some issues relating to rules of evidence. These issues should be resolved during the preliminary matters stage. **The Enforcement Division recommends that the Commission delegate a determination on the following issues to the Assigned Commissioner in each matter:**

Rules of Evidence - Objections

1. Whether objections to the application of the rules of evidence are permitted.
Options include:
 - a. No objections permitted
 - b. Objections permitted without explanation
 - c. Objections permitted, but must include an explanation of the legal justification for excluding evidence **(Recommended)**
2. If objections are permitted, who should rule on them when the Commission sits as a hearing panel.
 - a. The commission as a whole rules on objections and admissibility through a formal motion and majority vote **(Recommended)**
 - b. The Chair rules on objections and admissibility

6. Standard of Proof

Standard of Proof (Enforcement Reg 9(A)(3)): “The Commission may determine that a respondent has committed a violation of law only if a person of ordinary caution and prudence would conclude, based on a preponderance of the evidence, that the respondent has committed or caused the violation.”

Preponderance of Evidence: In civil court cases, this standard is used to denote instances in which it is more than 50 percent likely that the respondent committed the violation, or “more likely than not.” This standard requires less certainty than “clear and convincing evidence,” which in turn requires less certainty than “proof beyond a reasonable doubt.”

7. Continuances and Extensions

Extension of Time (Enforcement Reg 9(A)(10)(i)): “Whenever the Executive Director, a respondent, or a witness is required to complete an act or produce materials under this Section, that party may request an extension of time. Requests for extensions of time may be made in writing to the Commission Chair or the Commission Chair’s designee. The requester must deliver the request to the Commission Chair or designee and provide a copy of the request to all other parties no later than 10 business days before the deadline to complete an act or produce materials. The Commission Chair or designee will have the discretion to consider untimely requests. The Commission Chair or designee will approve or deny the request within 5 business days of the submission of the request. The Commission Chair or designee may grant the request only upon a showing of good cause.”

Continuance - Request (Enforcement Reg 9(A)(10)(ii)): “The Executive Director or any respondent may request the continuance of a hearing date. The requester must deliver the request to the Commission Chair or the individual Commissioner or hearing officer assigned to hold the hearing, and provide a copy of the request to all other parties no later than 10 business days before the date of the hearing. The Commission Chair or the individual Commissioner or hearing officer assigned to hold the hearing will have the discretion to consider untimely requests.”

Continuance - Determination (Enforcement Reg 9(A)(10)(iii)): “The Commission Chair or the individual Commissioner or hearing officer assigned to hold the hearing will approve or deny the request within 5 business days of the submission of the request. The Commission Chair or the individual Commissioner or hearing officer assigned to hold the hearing may grant the request only upon a showing of good cause.”

Hearings are subject to the following rules regarding continuances and extensions:

- Any party or witness may request an extension of time to complete any act or produce any material to the Commission. Reg. (9(A)(10)(i).
 - Requests must be made in writing to the Commission Chair or their designee and must be delivered to the Commission Chair or designee and all other parties at least ten business days before the relevant deadline. Reg. 9(A)(10)(i).
 - The Commission Chair or designee may approve or deny the request at his or her discretion, upon a showing of good cause, within five business days of receipt. Reg. 9(A)(10)(i).
- Any party may request the continuance of a Hearing date by delivering the request to the Commission Chair or Hearing Officer. Reg. 9(A)(10)(ii).
 - The party must provide a copy to all other parties. Reg. 9(A)(10)(ii).
 - The request must be delivered at least ten business days before the Hearing date. Reg. 9(A)(10)(ii).
 - The Commission Chair or Hearing Officer may approve or deny the request at their discretion, upon a showing of good cause, within five business days of receipt. Reg. 9(A)(10)(iii).

C. Presentation of Case – Oral Argument, Exhibits, and Witnesses

The Enforcement Regulations provide for the presentation of a case by the Enforcement Division and each respondent at the Hearing on the Merits. This includes a combination of oral argument, exhibits, and witnesses.

1. Oral Argument

Oral argument includes time for parties to make their case to the Hearing Officer and the Commission.

Oral Argument (Enforcement Reg 9(A)(8)): “At the hearing, the Executive Director and each respondent will be allowed a minimum of 15 minutes to make their case, with three minutes for rebuttal. The Commission may extend any party’s time.”

Oral Argument is subject to the following rules:

- Parties are allowed 15 minutes to “make their case,” with three minutes for rebuttal. Reg. 9(A)(8).
 - The 15-minute limit applies to opening and closing oral arguments and not the process of presenting evidence through witnesses and exhibits. Though the regulations have some ambiguity on this issue, it would be impractical for either party to present all exhibits, witnesses, and arguments in just 15 minutes.
- The Commission may extend any party’s time. Reg. 9(A)(8).

The Enforcement Regulations are silent on some issues relating to oral argument. These issues should be resolved during the preliminary matters stage. **The Enforcement Division recommends that the Commission delegate a determination on the following issues to the Assigned Commissioner in each matter:**

Oral Argument

1. What order opening and closing statements will be given. Options include:
 - a. Enforcement Division, as the prosecuting party, should go first for both **(Recommended)**
 - b. Another order approved by the Commission

2. Exhibits

Exhibits are a tool for parties to introduce evidence to be considered by the Commission. Exhibits include emails, physical objects, video or audio recordings, photographs, or other written documents.

Exhibits (Enforcement Reg 9(A)(6)): “Where both parties stipulate to the admissibility of an exhibit, the parties will so advise the Commission in advance of the hearing. For all other exhibits, each party must move to admit an exhibit at the hearing, and the other party will have an opportunity to object prior to the ruling on the admission.”

Exhibits are subject to the following rules:

- If the parties stipulate to the admissibility of an exhibit, the exhibit will automatically be introduced during the Hearing and does not need to go through the admission process. All parties must notify the Commission of any stipulated exhibit before the Hearing. Reg. 9(A)(6).
- Each party must move to admit any exhibit during the presentation of their case in chief. Reg. 9(A)(6).

- Once a party moves to admit an exhibit, the opposing parties may object to the admission of that exhibit and present their argument for objection. Reg. 9(A)(6).
- At this point, whoever is presiding over the hearing – either the Commission or the Hearing Officer – must determine the admissibility of the exhibit. Admissibility is governed by the rules of evidence cited above. Reg 9(A)(6).

Standard for Admissibility: Any “relevant evidence” shall be admitted if it is the sort of evidence on which “responsible persons are accustomed to rely in the conduct of serious affairs,” regardless of formal evidence rules. California APA Sec. 11513(c).

The Enforcement Regulations are silent on some issues relating to exhibits. These issues should be resolved during the preliminary matters stage. **The Enforcement Division recommends that the Commission delegate a determination on the following issues to the Assigned Commissioner in each matter:**

Introducing Exhibits

1. In the event that the entire Commission presides over the Hearing, how will rulings be made on objections or other admissibility issues. Options include:
 - a. The commission as a whole rules on objections and admissibility through a formal motion and majority vote **(Recommended)**
 - b. The Chair rules on objections and admissibility
2. Must parties authenticate each exhibit through a party with direct knowledge of the contents of the exhibit. Options include:
 - a. The parties are required to authenticate the exhibits through witness testimony **(Recommended)**
 - b. Exhibits can be introduced without witness authentication, but the parties must explain the nature and origin of the exhibit.

Stipulated Exhibits

1. Timing requirements for the parties to submit notice of stipulated exhibits. Options include:
 - a. Notice must be received by 48 hours before the hearing date and time **(Recommended)**
 - b. Other notice requirements chosen by the Commission
2. Formatting requirements for the notice of stipulated exhibits.
 - a. Establishing a template for the notice **(Recommended)**
3. Delivery requirements for the notice of stipulated exhibits. Options include:
 - a. Notice sent to every Commissioner **(Recommended)**
 - b. Notice sent only to the Chair
 - c. Notice sent only to the hearing officer
 - d. Notice sent via mail
 - e. Notice sent via email **(Recommended)**

3. Witnesses

Witnesses are another tool for parties to introduce evidence to be considered by the Commission.

Witnesses – General (Enforcement Reg 9(A)(7)): “Witnesses will be examined by the parties as follows: direct examination, cross examination, re-direct. After the parties have concluded their examination of a witness, Commissioners will have an opportunity to pose questions to the witness.”

Witnesses – Oaths and Affirmations (Enforcement Reg 9(A)(9)): “The Commission, and individual commissioners and hearing officers assigned to conduct hearings, may administer oaths and affirmations.”

(Cal. APA sec. 11513(a)): “Oral evidence shall be taken only on oath or affirmation.”

Witness examination is subject to the following rules:

- Witnesses shall be examined first via direct examination by the party that called the witness. Reg. 9(A)(6).
- Witnesses shall then be examined by the opposing party via cross-examination. Reg. 9(A)(6).
- The party that called the witness shall then be given an opportunity to conduct a re-direct examination of the witness. Reg 9(A)(6).
- After examination by all parties, the Commissioners shall have an opportunity to ask questions to the witness. Reg. 9(A)(6).
- Each witness must testify under oath. Cal. APA sec. 11513(a).
 - The Commission, Commissioners, and Hearing Officers have the authority to administer oaths and affirmations. Reg. (9)(A)(9).

The Enforcement Regulations are silent on some issues relating to witnesses. These issues should be resolved during the preliminary matters stage. **The Enforcement Division recommends that the**

Commission delegate a determination on the following issues to the Assigned Commissioner in each matter:

Witness Examinations

Witness Examinations: The following issues should be resolved prior to the commencement of a Hearing on the Merits:

1. Setting time limits for direct, cross, and redirect examinations. Options include:
 - a. No time limits (apart from the total time limit on the party's case **(Recommended)**)
 - b. One total time limit for all witnesses called by each party
 - c. A time limit for each party with each witness
2. In the event that the Commission presides as the Hearing panel, how will rulings be made on objections or other admissibility. Options include:
 - a. The Commission as a whole rules on objections and admissibility through a formal motion and majority vote **(recommended)**
 - b. The Chair rules on objections and admissibility
3. Time requirements for Commissioner witness questions. Options include:
 - a. No time limits **(Recommended)**
 - b. Imposing time limits on each Commissioner;
 - c. Imposing time limits on the Commission as a whole;
4. In the event that the Commission presides as the hearing panel, how will rulings be made on objections to Commissioner witness questions. Options include:
 - a. The commission as a whole rules on objections through a formal motion and majority vote with the Commissioner who asked the question recused
 - b. The Chair rules unless the Chair asked the question, in which case the Vice Chair rules
5. Remote Video Testimony. Options include:
 - a. The Commission will not allow remote video testimony
 - b. The Commission will allow remote video testimony only from witnesses that can demonstrate inability to be present
 - c. The Commission will allow remote video testimony from all witnesses **(Recommended)**

D. Findings and Orders

The Enforcement Regulations establish the process for determining whether a violation has occurred, and if a violation has occurred, for imposing any orders and penalties. The Enforcement Regulations also outline potential remedies that the Commission can impose.

1. Findings

After the parties have presented their cases, the Commission will determine whether it will find that the respondents have committed any violations of law.

Finding of Violation (Enforcement Reg 9(B)): “If the Commission conducts the hearing on the merits, the Commission will determine, no later than 45 calendar days after the date the hearing is concluded, whether the respondent(s) has committed a violation of law.”

Hearing Report (Enforcement Reg 9(B)(1)): “If the Commission assigns one of its members or an outside hearing officer to conduct the hearing on the merits, the assigned member or hearing officer will submit a report and recommendation to the Commission no later than 30 calendar days after the date the hearing is concluded. Thereafter, the Commission will determine, no later than 45 calendar days after the date the report and recommendation is delivered, whether the respondent(s) has committed a violation of law.”

Vote (Enforcement Reg 9(B)(2)): “The votes of at least three Commissioners are required to find a violation of law.”

Basis of Finding of Violation (Enforcement Reg 9(B)(3)): “The finding of a violation will be supported by findings of fact and conclusions of law and must be based exclusively on the record of the proceedings before the Commission. Each Commissioner who participates in the decision will certify on the record that he or she personally heard the testimony (either in person or by listening to a tape or recording of the proceeding) and reviewed the evidence, or otherwise reviewed the entire record of the proceedings.”

Finding of No Violation (Enforcement Reg 9(E)): “If the Commission determines that there is insufficient evidence to establish that the respondent has committed a violation of law, or if the Commission determines that there is sufficient evidence to establish that the respondent has not committed a violation of law, the Commission will publicly announce this fact. No further action will be taken by the Commission to review or investigate the allegations contained in the complaint. If a complainant desires further review, the complainant must follow the procedures set forth in Section 1094.5(a) of the California Code of Civil Procedure governing judicial review of any final administrative order or decision.”

Default Orders (Enforcement Reg 9(F)): “If the Executive Director followed the notice of hearing procedures identified in these Regulations, and the respondent(s) failed to appear before the Commission for a hearing on any matter, then the Commission may enter an order adverse to the interests of the respondent(s) who failed to appear, including but not limited to, a Default Order for injunctive relief and administrative penalties after a hearing on the merits. The Executive Director bears the burden of proving that the respondent(s) was properly served in accordance with these regulations. A default order is a final administrative order or decision. If a party desires further review, he must follow the procedures set forth in Section 1094.5(a) of the California Code of Civil Procedure governing judicial review of any final administrative order or decision.”

Findings are subject to the following rules:

- The votes of at least three Commissioners are required for each separate finding of a violation of law. Reg. 9(B)(2).
- Discussion and action on a Hearing on the Merits, including imposition of an order or penalty or a finding of no violation, must take place in public session. Reg. 9(A)(2).
- A finding of a violation must be supported by findings of fact and conclusions of law and be based exclusively on the record of the proceedings. Reg. 9(B)(3).
- If a Hearing Officer presided, that officer must submit a report and recommendation within 30 calendar days of the hearing. Reg. 9(B)(1).
 - The Hearing Officer’s report must include proposed findings of fact and conclusions of law. Reg. 8(A)(2).
 - The Hearing Officer’s report must be delivered to the Commission, the Executive Director, and each respondent. Reg. 8(A)(2).
 - After the report is received, the Executive Director will put the matter on the agenda for consideration at the next Commission meeting. Reg. 8(A)(2).
 - If a Hearing Officer presided, the Commission must then determine whether respondents committed a violation of law within 45 calendar days after the report and recommendation are delivered. Reg. 9(B)(1).
- If the full Commission presided over a hearing, the Commission must determine whether respondents committed a violation of law within 45 calendar days after the hearing.
- If the Commission does not find any violation, the Commission must publicly announce this fact and no further action will be taken. Reg. 9(E).
 - A complainant may appeal a final order through the procedures in the California Code of Civil Procedure. Reg. 9(E).
- If the Executive Director followed all notice procedures and any respondent failed to appear for the hearing, the Commission may enter an adverse judgement in default. Reg. 9(F).
 - A party may appeal a default order. Reg. 9(F).

The Enforcement Regulations are silent on certain issues relating to findings. These issues should be resolved during the preliminary matters stage. **The Enforcement Division recommends the Commission delegate a determination on the following issues to an Assigned Commissioner in each matter:**

Default Orders

1. When the Commission will determine whether to issue a default order. Options include:
 - a. The Commission immediately votes on whether to issue a default order
 - b. Commission staff request a default order and present evidence that it followed all notice procedures, after which the Commission votes on whether to issue a default order (**Recommended**)
 - c. The decision on a default order is placed on the agenda for the Commission's next monthly meeting
2. How the Commission will determine whether to issue a default order. Options include:
 - a. A full Commission vote with three votes required for a determination (**Recommended**)
 - b. Other procedures, to be determined by the Commission

Orders and Penalties - Timing

1. When the Commission will vote on orders and penalties. Options include:
 - a. At the same meeting during which the Commission votes on whether to find a violation (**Recommended**)
 - b. At the next regular meeting of the Commission after finding a violation Under this option, the next meeting must be within 45 days of the hearing, and Commissioners are prohibited from discussing the merits of the case with anyone, including each other, until a final determination is made at a public meeting

2. Orders and Penalties

If the Commission finds any violations of law, it will then issue orders or penalties.

Orders and Penalties – General (Enforcement Reg 9(C)): “The votes of at least three Commissioners are required to impose orders and penalties for a violation.”

Orders and Penalties – Options (Enforcement Reg 9(C)(1-5)): “The Commission may issue orders and penalties requiring the respondent(s) to:

1. Cease and desist the violation;
2. File any reports, statements, or other documents or information required by law;
3. Pay a monetary penalty to the general fund of the City in an amount permitted under the law that the Commission finds the respondent has violated, or, if the law does not specify the amount of the monetary penalty, in an amount up to \$5,000 for each violation, or three times the amount which the respondent failed to report properly or unlawfully contributed, expended, gave or received, whichever is greater. Unless otherwise ordered by the Commission, any penalties imposed by the Commission must be paid in full by the respondent within 90 calendar days of the Commission’s decision;
4. Order forfeiture of campaign contributions that do not comply with the Campaign Finance Reform Ordinance, San Francisco Campaign & Governmental Conduct Code section 1.100, et seq.; and
5. Any other relief the Commission deems appropriate and within its authority under Charter section C3.699-13.”

Penalty Factors (Enforcement Reg 9(D)(1-7)): “When deciding on an order and penalties, the Commission will consider all the relevant circumstances surrounding the case, including but not limited to:

1. The severity of the violation;
2. The presence or absence of any intention to conceal, deceive, or mislead;
3. Whether the violation was willful;
4. Whether the violation was an isolated incident or part of a pattern;
5. Whether the respondent has a prior record of violations of law;
6. The degree to which the respondent cooperated with the investigation and demonstrated a willingness to remedy any violations; and
7. The respondent’s ability to pay will be considered a mitigating factor if the respondent provides documentation to the Director of Enforcement of such inability, which must include three years’ worth of income tax returns and six months’ worth of bank records or accounting statements, at a minimum.”

Orders and Penalties are subject to the following rules:

- The votes of at least three Commissioners are required to impose any order or penalty for a violation. Reg 9(C).
- The Commission can issue any penalty or order as described in the Enforcement Regulations, listed above, including any other relief it deems appropriate. Reg. 9(C).
- The Commission must consider all relevant circumstances around a case, including but not limited to the factors listed in the Enforcement Regulations, listed above. Reg. 9(D).