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EXECUTIVE DIRECTOR

Date: May 8, 2009

To: Members, Ethics Commission

From: John St. Croix, Executive Director
By: Richard Mo, Chief Enforcement Officer

A handwritten signature in black ink, appearing to read "Richard Mo", written over the name of the Chief Enforcement Officer.

Re: Proposed Changes to Investigations and Enforcement Regulations

I. Introduction

The Ethics Commission's Regulations for Investigations and Enforcement Proceedings ("Regulations") were last amended in November 2006. Those changes to the Regulations focused on streamlining the investigations and enforcement process. At that time, enforcement staff had not yet advanced a complaint beyond a probable cause hearing. Recently, the Commission completed a full complaint cycle, which included a probable cause hearing, a four-day hearing on the merits, numerous briefs and orders, and several hundred pages of exhibits. This process took place over the course of over 14 months.

As a result of advancing a complaint through the full administrative hearing process for the first time, enforcement staff recommends several changes to the Regulations. The proposed changes would further streamline the investigations and enforcement process, including the hearing procedures, and provide clarity and uniformity in the Regulations. This memo discusses all of the proposed substantive changes. While it does not discuss proposed technical changes, staff will be pleased to answer any questions from the Commissioners during the May 11 meeting.

II. Proposed Substantive Changes

- 1) Clarifying Effective Means of Delivery – Sections II.F,M; XIII.J.

Existing practice: Under the current Regulations, the terms "delivery" and "service" are used interchangeably, and the Regulations do not allow for the use of e-mail for purposes of delivery. Also, for delivery to respondent(s), the Regulations require the Commission to effectuate such delivery via U.S. certified mail.

Proposed change: Eliminating the term “service” from the Regulation’s definitions and using “delivery” instead will eliminate past difficulties encountered by staff when trying to deliver documents to an unwilling recipient. Because the U.S. Postal Service requires an individual to sign for certified mail or pick up the mailing at a post office, this requirement has led to delays in the handling of complaints. In addition, certified mail is costly. Eliminating the requirement of delivery by certified mail will alleviate an unnecessary impediment to the efficient processing of complaints. Allowing the parties to agree to an alternate method of delivery, such as e-mail, will provide for quicker delivery as well as help the Commission save costs and materials.

- 2) Clarifying the Preliminary Review Process and Setting Forth Possible Reasons that the Executive Director May Dismiss a Complaint – Section IV.A-B.

Existing practice: Under the current Regulations, any complaint submitted on a Commission form that is signed under penalty of perjury by the complainant and alleges a violation of law under the Commission’s jurisdiction must be processed and reviewed by the Executive Director. The Executive Director may dismiss the complaint if there is no reason to believe that a violation of law occurred. However, the Regulations do not specify the grounds upon which the dismissal can be based, nor do they specify what constitutes a preliminary review of the complaint.

Proposed change: The proposed change specifies the actions that the Executive Director may take during the preliminary review of a complaint. The Executive Director would have the ability to conduct a preliminary review of each complaint, which may include reviewing relevant documents, speaking with the complainant and/or respondent, and making any other inquiry to ascertain if a full investigation is warranted.

The proposed change also provides reasons for which the Executive Director may dismiss a complaint. Although the list is not exhaustive, it provides a basic framework and sets forth the parameters for dismissing a complaint at this stage. After initial review, the Executive Director may dismiss the complaint when, for example: 1) the evidence does not support the allegations; 2) the allegations, if true, do not constitute a violation of law within the Commission’s jurisdiction; 3) the complaint contains an expression of opinions, rather than specific allegations; or 4) the allegations are already under investigation by enforcement staff, or have already been resolved by the Commission or another governmental or law enforcement agency.

- 3) Increasing the Amount of Time for a Respondent to File a Response to the Probable Cause Report – Section VII.B.-C.

Existing practice: Under the current Regulations, the Executive Director must deliver the probable cause report to the respondent at least 30 days before the hearing date. If the respondent chooses to prepare a response, the respondent must deliver the response within 15 days of the hearing.

Proposed change: Under the current Regulations, the respondent may have only 15 days to review the probable cause report, prepare a response and effectuate delivery. Staff believes that the respondent should be provided a longer time period in which to prepare his or her response. By changing the deadlines so that the probable cause report is due at least 45 days before the hearing and the response is due no later than 20 days before the hearing, the respondent receives an extra ten days, for a total of 25 days, to prepare and deliver his or her response.

4) Making Public Probable Cause Hearings Regarding Alleged Willful Violations of Sunshine Ordinance – Section VIII.A.2.

Existing practice: Under the current Regulations, all probable cause hearings are held in closed session, unless the respondent requests that the hearing be held in public. There are no regulations that specifically address complaints alleging violations of the Sunshine Ordinance.

Proposed change: Probable cause hearings regarding alleged willful violations of the Sunshine Ordinance will be held in public, unless otherwise provided by state or local law. The Commission routinely receives referrals from the Sunshine Ordinance Task Force (“SOTF”) that allege a willful violation of the Sunshine Ordinance. These referrals contain Orders of Determinations issued by the SOTF, as well as underlying documentation regarding the alleged violation of the Sunshine Ordinance. Because all of the materials forwarded from the SOTF to the Commission are already public documents, staff believes that any probable cause hearing where the allegation concerns a willful violation of the Ordinance should be held in open session. Under Section XIII.B.3, the proposed regulations clarify that the handling of complaints alleging a willful violation of the Sunshine Ordinance will be handled like other complaints, but internal notes by staff may not be disclosed until after the complaint is dismissed or the Commission has issued its decision following the hearing on the merits.

For all other complaints, the probable cause hearing will continue to be held in closed session, unless the respondent requests that the hearing be public.

5) Eliminating the Possibility of Live Witness Testimony at the Probable Cause Hearing – Section VIII.A.3.

Existing practice: The current Regulations do not address whether either party may present live witness testimony during a probable cause hearing. In practice, attorneys for respondents have sometimes requested and received permission to speak on behalf of the respondent during the probable cause hearing.

Proposed change: During a probable cause hearing, the Commission has already received and reviewed briefs from both parties. Staff believes that the additional probative value of any testimony by live witnesses would be outweighed by the extra consumption of time. Adopting a provision that neither party will be allowed to provide

live witness testimony during the probable cause hearing will expedite the Commission's hearing process. The respondent's right to appear and be represented by counsel at the probable cause hearing remains intact.

6) Maintaining Consistency in the Standards of Proof at Probable Cause Hearings and Hearings on the Merits – Sections VIII.A.4.; XII.A.2.

Existing practice: Under current Regulation VIII.A.3, the Commission “may find there is probable cause to believe a violation of City law... has occurred only if the evidence is sufficient to lead a person of ordinary caution and prudence to believe that a violation has been committed and that the respondent committed or caused the violation.” Under Regulation XII.A.2, after a hearing on the merits the Commission may determine that a violation of City law occurred “only if a person of ordinary caution and prudence would conclude, based on a preponderance of the evidence, that the violation has occurred.” Staff believes that the use of different language in both standards creates confusion.

Proposed change: The proposed changes use the same language (“the respondent has committed the violation”) as the standard in both the probable cause hearing and the hearing on the merits. This change will help eliminate any confusion.

A probable cause finding requires the Commission to determine that a person of ordinary caution and prudence would conclude, “based on the evidence, that there is a reasonable ground to suspect that the respondent has committed the violation.” A finding after a hearing on the merits, however, requires that the Commission determine that the same prudent person would conclude, based on a preponderance of the evidence, that the respondent has committed the violation. Both standards provide a measurable, objective basis for making a determination at the respective stages of the complaint process.

7) Clarifying the Probable Cause Hearing Procedures – Section VIII.B.1.

Existing practice: Under the current Regulations, in the section concerning general rules and procedures for probable cause hearings, the Commission shall sit as a hearing panel to conduct the probable cause hearing. In the alternative, the Commission may decide to assign one of its members to conduct the probable cause hearing and submit a report and recommendation to the full Commission. However, the next section, which governs the timeline for the making of a probable cause determination, references the possibility of having an outside hearing officer conducting the hearing or preparing a report.

Proposed change: Deleting the reference to the outside hearing officer will clarify that for a probable cause hearing, the only option other than the Commission sitting as a hearing panel is for the Commission to assign one of its members to conduct the hearing. Because no witness testimony is taken at the probable cause hearing, there is no need to have an outside hearing officer.

8) Allowing Amendments to Probable Cause Determinations – Section VIII.D.

Existing practice: The current Regulations do not provide any mechanism by which staff may add new charges to a probable cause determination. If staff were to discover additional alleged violations after a determination of probable cause and before the hearing on the merits, the only recourse would be to initiate a separate complaint against the respondent.

Proposed change: After a determination of probable cause but prior to scheduling a hearing on the merits, the Executive Director may request that the Commission amend the probable cause determination to add or amend charges against the respondent. Such request must be made no later than 60 days prior to a scheduled hearing on the merits. In situations where staff discovers additional allegations during an investigation, staff will be permitted to amend and/or add such additional allegations to the existing complaint, provided that respondent(s) will have an opportunity to file a response to the additional allegations and the Commission must determine that probable cause exists that respondent(s) committed the additional violations. The process will save time by dispensing with the requirement that staff initiate a new complaint based on the same nucleus of underlying facts.

9) Designating the Accusation as the Official Charging Document – Section IX.A.

Existing practice: The current Regulations do not designate any specific document as the official charging document. This creates the potential for ambiguity and may lead a respondent to be confused about the exact charges he or she is facing.

Proposed change: After a determination of probable cause and prior to a hearing on the merits, the Executive Director must issue an accusation. The accusation must be issued within ten days of the Commission's probable cause determination rather than 45 days prior to the hearing on the merits. This proposed change provides not only earlier notice to respondent(s), but also specifies the provisions of each law allegedly violated, in addition to setting forth the acts or omission with which the respondent is charged.

10) Request for Resolution of Procedural Matters Affecting Conduct of Hearing on the Merits – Section X.B.

Existing practice: For a hearing on the merits, the current Regulations provide for the resolution of preliminary and procedural matters, but the Regulations do not specifically identify what constitutes a procedural matter. In the past, Respondents have submitted requests for resolution of preliminary and procedural matters that were considered even though they did not comply with the required 25-day advance notification.

Proposed change: The new provisions broaden and clarify the availability for resolution of preliminary and procedural matters. They also change the time for a written opposition from 15 days prior to the hearing to ten days after delivery of the request and permit a

written reply due no later than five days after the delivery of the opposition. Finally, they allow a party to request resolution of a procedural matter affecting the conduct of the hearing on the merits, either before or during the hearing on the merits, but no later than the conclusion of a hearing on the merits. This would allow, for example, the assigned Commissioner or hearing officer to consider motions in limine and other matters that are not procedural in nature. If either party requests a written decision, the assigned Commissioner or hearing officer must issue a written decision no later than 20 days after the date of the request for resolution of the matter.

11) Requiring Executive Director to Notify Commission of Exculpatory Information – Section XI.A-C.

Existing practice: Under the current Regulations, if the Executive Director discovers exculpatory evidence after a probable cause determination and prior to a hearing on the merits, he or she may present the exculpatory information to the Commission and recommend dismissal of the complaint. There is no language that allows for the Executive Director to recommend the dismissal of specific charges instead of dismissal of the entire complaint.

Proposed change: After the issuance of the Commission's probable cause determination, if the Executive Director becomes aware of or discovers any exculpatory information with respect to any of the charges listed in the accusation, the Executive Director may recommend that the Commission dismiss the complaint, based on the discovery of the exculpatory evidence or other good cause. Upon the issuance of a public memorandum setting forth reasons for the dismissal, if two or more Commissioners do not calendar the dismissal recommendation, or if in open session a majority of the Commission does not vote to reject the dismissal recommendation, the complaint will be deemed dismissed. Along the same lines, if the Executive Director determines not to proceed with a specific charge listed in the accusation, the Executive Director must so inform the Commission and respondent in writing, and the Commission will not find a violation of the specific charge.

12) Allowing Either Party to Request that the Commission Exclude a Witness During the Hearings on the Merits – Section XII.A.1.

Existing practice: The current Regulations provide that witnesses may be excluded at the hearing on the merits at the discretion of the Commission, assigned Commissioner or hearing officer.

Proposed change: Under current court practice, either party may request that a witness be excluded from the courtroom during the proceedings. The proposed changes track this practice and permits any party to request the exclusion of a witness.

13) Access to Complaints and Related Documents and Deliberations – Section XIII.B.1-3.

Existing practice: Under the current Regulations, after a determination of probable cause, a complaint and related documents may not be disclosed except as required by the California Public Records Act. In practice, staff has encountered situations where respondents, after the Commission had made a finding of probable cause in a closed probable cause hearing, requested that the probable cause report be made public.

Proposed change: The proposals provide clarity on what documents remain confidential. For example, unless the respondent had requested that the probable cause hearing be held in public, the probable cause report, response, and rebuttal are confidential. All investigative documents created prior to the probable cause determination shall also remain confidential, unless the Executive Director determines that disclosure of the complaint to the respondent is necessary to the conduct of the investigation. All investigative documents created after the probable cause determination are confidential, until any such document is either delivered to the Commission or respondent, introduced into evidence or as an exhibit, or distributed for public consumption, via an agenda or a press release.

For complaints alleging willful violations of the Sunshine Ordinance, no documents may be disclosed except as necessary to the conduct of an investigation or as required by the California Public Records Act or the Sunshine Ordinance. Internal staff notes related to alleged Sunshine Ordinance violations may not be disclosed until after the dismissal of the complaint or the issuance of a final decision by the Commission.

14) Changing the Statute of Limitations From Five Years to Four Years – Section XIII.F.

Existing practice: Under the current Regulations, if there is not existing statute of limitations for the law allegedly violated, the probable cause report must be delivered within five years of the date of the events which form the basis of the complaint, or the date that the events constituting the basis of the complaint were discovered by the Commission, whichever is later.

Proposed change: The proposal changes the statute of limitations from five to four years, which is consistent with the statute of limitations for enforcement of conflict of interest, lobbyist and campaign consultant laws. (The statute of limitations under CFRO is five years).