
SAN FRANCISCO ETHICS COMMISSION

Enforcement Hearing Guidebook

May 1, 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. Excerpts from the law are contained in grey text boxes.

In certain instances, the applicable rules are silent or unclear as to particular 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. These sections are contained in blue text boxes.

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 (“PC 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 (“PC Report”) to the Executive Director and the respondent. The first phase of PC Proceedings includes a series of filings from all parties. Filings during this phase are subject to page and formatting requirements.

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

1. Probable Cause Report

PC 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 – Contents (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. Enforcement Reg 7(B)(2).
- A PC Report must include certain content as described in the box above. Enforcement 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 additional requirements during 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. Enforcement Reg 7(B)(3).
- Complainants may provide additional evidence to the Executive Director in response to the PC Report. Enforcement Reg 7(B)(3).
- The Executive Director has discretion to set the scope of the complainant's participation. Enforcement 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 recommended 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. Enforcement Reg (7)(B)(1).
- The Commission makes the final finding of probable cause (described in further detail below). Enforcement Reg 7(B)(1).
- The Executive Director may not recommend a Probable Cause Determination ("PC 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. Enforcement Reg 7(B)(1).

2. General Procedures

PC Conferences are subject to the following general procedural rules.

a. Requesting a PC Conference

PC Conference requests are subject to the following requirements:

- The Executive Director, Director of Enforcement, or any respondent may request a PC Conference. Enforcement 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. Enforcement Reg 7(C)(2).
- The Executive Director will set a time for the PC Conference. Enforcement 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. Enforcement 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. Enforcement Reg 7(C)(1).
- If a respondent requests, and all other respondents agree, a PC Conference may be open to the public. Enforcement Reg 7(C)(1).
- After a PC Determination, the PC Report, Response, and Rebuttal will remain confidential unless the PC Conference was public. Enforcement 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. Enforcement Reg 7(C)(3)(iv).
- Recordings must be provided to any respondent upon request. Enforcement Reg 7(C)(3)(iv).
- A respondent may request a certified court reporter to record the Conference. Enforcement Reg 7(C)(3)(iv).
 - The respondent must cover the cost of the court reporter. Enforcement Reg 7(C)(3)(iv).
 - The respondent must provide a copy of the transcript to the Executive Director and any other respondents. Enforcement 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. Enforcement Reg 7(C)(3)(v).
- 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. Enforcement Reg 7(C)(3)(i).
- Any respondent may bring legal counsel or another representative. Enforcement 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. Enforcement 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. Enforcement 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. Enforcement Reg 7(C)(3)(iii).

3. Determination

After a PC 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.” Enforcement Reg 7(D)(1).
- A recommendation for finding probable cause does not constitute a finding that a violation has occurred. Enforcement Reg 7(D)(1).

b. Finding of Probable Cause

Findings of probable cause are subject to the following requirements:

1. 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. Enforcement Reg 7(D)(2).
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.” Enforcement Reg 7(D)(2).
3. 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. Enforcement Reg 7(D)(5).
4. The Executive Director cannot make a determination before a respondent’s deadline to respond to a PC Report. Enforcement Reg 7(D)(5).
5. The Executive Director must deliver the recommended determination to the Commission the following business day after making the determination. Enforcement Reg 7(D)(6).
6. The Executive Director must deliver the recommended determination to each respondent and the Director of Enforcement within seven calendar days of making the determination. Enforcement 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. Enforcement 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. Enforcement 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. Enforcement 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. Enforcement Reg 7(D)(8).

d. Default Order (PC)

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

7. 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. Enforcement Reg 7(D)(4).
 - The Director of Enforcement bears the burden of proving proper notice. Enforcement Reg 7(D)(4).

C. Commission Ratification

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

1. Commissioner Requests for Probable Cause Review

Commission ratification of the Executive Director’s recommended finding of probable cause is subject to the following general requirements:

- The Executive Director must inform the Commission of a recommended PC Determination by close of business the following business day. Enforcement Reg 7(D)(6).
- Any Commissioner may request review of a recommended PC Determination by the full Commission in closed session at the next regularly scheduled meeting. Enforcement 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. Enforcement Reg 7(D)(6).
- If no Commissioner requests review by the deadline, the Commission has ratified the recommended PC Determination. Enforcement 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. Enforcement 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 PC Determination to the Commission’s website.

- There is no deadline for when the Executive Director must deliver notice of the ratified PC 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 PC Determination is subject to the following requirements:

- If any Commissioner requests review of a recommended PC Determination by the deadline, then the Commission must consider the recommendation in closed session at its next regularly scheduled meeting. Enforcement Reg 7(D)(6)(i).
- During closed session review, the Commission may hear argument from the Director of Enforcement or respondent(s). Enforcement Reg 7(D)(6)(i).
 - Parties will not have an opportunity to provide additional written argument to the Commission for closed session review. Enforcement Reg 7(D)(6)(i).
- Once a review of the recommended PC Determination has been requested, the Determination is not final until the Commission ratifies it by a majority vote of three Commissioners. Enforcement 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” Enforcement Reg 7(D)(1) (emphasis added).
- 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. Enforcement Reg 9(A)(2).
- If the Commission votes to ratify a finding of probable cause, the Executive Director must post the ratified PC Determination to the Commission’s website and deliver it to each party in the case. Enforcement Reg 7(D)(6)(ii).

II. Preliminary Matters

Preliminary matters are matters that need to be addressed and resolved before a case proceeds to a full Hearing on the Merits, including certain rules and decisions governing the process for a Hearing. Following the issuance of a ratified Probable Cause Determination, the resolution of preliminary matters is the first stage of the administrative hearing process. Preliminary matters must be heard and decided prior to the actual Hearing on the Merits, which is covered in Part III of this Guidebook. This section discusses each of the five types of preliminary matters listed in Enforcement Regulation 8(F) and seeks to explain the provisions of the Enforcement Regulations regarding the resolution of preliminary matters, as well as the role of the Commission or a presiding officer in the administration of preliminary matters. Where the Enforcement Regulations do not fully explain the process for resolving a preliminary matter, 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 them, 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 or to an outside hearing officer. The rest of this guide will use the phrase “Assigned Commissioner” to refer to whoever presides over preliminary matters, whether an individual or the full Commission. The Assigned Commissioner has authority to make preliminary determinations, and when the determinations are made by an individual, then the Commission, upon request by the Executive Director or Respondent, may review those preliminary determinations.

The delegation of preliminary determinations is subject to the following provisions:

- The Commission, upon majority approval, may assign an individual Commissioner a hearing officer to hear and decide preliminary matters.
- The Assigned Commissioner makes an actual determination regarding preliminary matters.
- When made by an individual and not the entire Commission, a determination on a preliminary matter is subject to review by the Commission upon request by either party.

Delegation to an Assigned Commissioner (Full Commission): 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 (**Recommended**);
2. Appoint any licensed attorney to preside over preliminary matters;
3. The full Commission presides over preliminary matters in public session.

****Note: while considering whether to delegate the review of preliminary matters to an Assigned Commissioner, the Commission should establish certain basic parameters for the preliminary matters stage. These items are discussed below, but are listed here for convenience:***

- The timeline for the parties to submit motions regarding preliminary matters. (See page 20 below).
- The process for the parties to submit motions, including the request for the issuance of subpoenas regarding preliminary matters. (See page 18 below).
- The process for review of any of the Assigned Commissioner's Determinations if an Assigned Commissioner presides over the preliminary matters and a request is made. (See page 22 below).

B. Preliminary Matters – Nature and Scope

The Enforcement Regulations contemplate that the Assigned Commissioner will hear and decide all preliminary matters but are silent on some aspects of the process for presiding over preliminary matters. 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 do not clearly define the nature and scope of these preliminary matters and the process

through which the preliminary matters must be heard and decided. This section addresses the nature and scope of preliminary matters, and section (II.C) addresses the process for deciding them.

1. Procedural Matters

The Enforcement Regulations do not provide a definition for “procedural matters.” However, the

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.”

Regulations do contemplate that the following matters will need to be resolved before the case proceeds to a full hearing on the merits. Note that some of 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.
 - Permission to submit hearing briefs to the Commission via email.
- 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, including whether to impose any time limits on questioning.
 - Whether to allow video testimony.
- 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 oral arguments, including opening and/or closing statements.
- Orders
 - The procedure for issuing a default order.
 - The timing for voting on orders and penalties.
- 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 a criteria or 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 any enforcement action. 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.”

Disqualification of Commission members are subject to the following requirements under SFC&GCC:

- Commissioners are disqualified and must recuse themselves from matter in which they have a financial conflict of interest.
- Commissioners must 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 matter before them.

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.

CA APA Section 11425.40:

- (a) The presiding officer is subject to disqualification for bias, prejudice, or interest in the proceeding.
- (b) It is not alone or in itself grounds for disqualification, without further evidence of bias, prejudice, or interest, that the presiding officer:
 - (1) Is or is not a member of a racial, ethnic, religious, sexual, or similar group and the proceeding involves the rights of that group.
 - (2) Has experience, technical competence, or specialized knowledge of, or has in any capacity expressed a view on, a legal, factual, or policy issue presented in the proceeding.
 - (3) Has a lawyer or public official participated in the drafting of laws or regulations in an effort to pass or defeat laws or regulations, the meaning, effect, or application of which is in issue in the proceeding.
- (c) The provisions of this section governing disqualification of the presiding officer also govern the disqualification of the agency head or other person or body to which the power to hear or decide in the proceeding is delegated.
- (d) An agency that conducts an adjudicative proceeding may provide by regulation for peremptory challenge of the presiding officer.

Disqualification of Commission members are subject to the following requirements under the CA APA:

- Commissioners are subject to disqualification for bias, prejudice, or interest in the proceeding.
- Even when there is evidence of other factors as listed in subsection (b)(3) above, there must still be further evidence of bias, prejudice, or interest to require disqualification.
- The same requirements govern disqualification requirements for an agency head.
- The Commission by regulation may provide for peremptory challenge of the presiding officer.

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 CA 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 may be required 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 PC Determination are true, as a matter of law those charges do not state a violation of law as alleged.” Enforcement 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 PC process or new evidence discovered after a PC 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 (CA APA Section 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 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. (**Note:** under the Enforcement Regulations, a new pleading would mean the issuance of a new PC Report and the initiation of a new PC process. Thus, rather than extend the discovery timeline, a new pleading would reset the clock to restart the entire PC process).

Privilege and Confidentiality in Discovery (CA APA Section 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 (Assigned Commissioner): The Assigned 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 Assigned 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 Assigned Commissioner has the authority to issue subpoenas during the course of determining preliminary matters prior to a Hearing on the Merits.

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 Enforcement Regulations section 8(D)(1):

- 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 (Full Commission): 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 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 before the hearing occurs. 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. To avoid such delay, the Commission has the option to:

1. Set a new deadline for the request for issuance of subpoenas (**Recommended**):
 - Request for issuance of subpoena would be due 30 calendar days after the Commission meeting at which an Assigned Commissioner is appointed, or
2. 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.

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 process for resolving of preliminary matters entails three steps: (1) a motion for consideration of a preliminary matter by a party, (2) the hearing and deciding of the preliminary matter and issuance of an actual determination on the preliminary matter by the Assigned Commissioner; and, if requested by the

Executive Director or a respondent, (3) the review of the Assigned Commissioner’s decision. Section 8(F) of the Enforcement Regulations sets out the process for requesting a resolution of preliminary matters. 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.

1. Motion to Request Consideration of a Preliminary Matter

Motion to Request Consideration of Preliminary Matters (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)”

Submission of Motions, Responses, and Replies: the timeline provided under section 8(F) of the Enforcement Regulations does take into account the amount of time that would be required for the resolution of preliminary matters, including the submission of responses, replies, determinations, and review of such determinations if a request is made, before the commencement of the Hearing on the Merits. 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. Finally, the Enforcement Regulations do not specify a particular process through which preliminary matters must be resolved. Before a matter proceeds to an Assigned Commissioner, the Commission should establish the timeline and process for the submission of motions by parties to request a resolution of preliminary matters.

Deadline for Submission of Preliminary Matter Motions (Full Commission): To assist in resolving preliminary matters in an efficient and transparent way the deadline for the submission of motions should be established by the Commission at the beginning of the preliminary matters stage. The options the Commission may consider include:

1. Set a new timeline for the submission of preliminary matter motions (**Recommended**):
 - Request due 30 calendar days after the Commission meeting at which an Assigned Commissioner is appointed.
 - Response due 15 calendar days after Request is submitted.
 - Reply due 10 calendar days after the Response is submitted.

2. Follow the timeline set under the Enforcement Regulations:
 - Request due 15 calendar days prior to the hearing on the merits.
 - Response due 10 calendar prior to hearing on the merits.
 - Reply due 7 calendar days prior to the hearing on the merits.

Process for Submission of Motions (Full Commission): the Commission should also establish a process for the submission of motions by parties. Options include:

- By email to the Assigned Commissioner and opposing party (**Recommended**), or
- By mail to the Assigned Commissioner and opposing party.

2. Determination of Preliminary Matters and Extension of Times

The Enforcement Regulations do not set forth a specific process for resolving preliminary matters once a motion is made by either party and responses and replies, if any, are submitted. Additionally, the Enforcement Regulations do not prescribe any particular format by which the Assigned Commissioner's determination should be issued.

Determination of Preliminary Matters (Assigned Commissioner): The Assigned Commissioner should resolve all preliminary matters in the most fair and efficient way to allow the matter proceed to a full hearing on the merits. Also, the Assigned Commissioner should deliver to the Commission and all parties any actual determinations made at the conclusion of the preliminary matters. The Assigned Commissioner may consider the following options:

1. Written determination delivered to the full Commission and all parties (**Recommended**), or
2. Verbal determination delivered to the full Commission and all parties at the next regularly scheduled meeting.

If the determination is issued in writing, the Assigned Commissioner should follow a set process for delivery of the determination on preliminary matters to the Commission and all parties. Options include:

1. Email determination to Commissioners, the Executive Director, Director of Enforcement, and Respondent. (**Recommended**).
2. Send determination via mail as provided under section 8(H) of the Enforcement Regulations.

Extensions of Time: The Enforcement Regulations are silent regarding the extension of deadlines as it relates to preliminary matters. (Extensions of time during the hearing phase are discussed in Section III below). It is unclear whether any extensions on preliminary matters should be entertained, including for the submission of preliminary matter motions or other filings at the preliminary matters stage. The Commission may consider the following options:

1. **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.
2. **CA APA Section 11524(a):** These provisions of the CA 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 by an Assigned Commissioner 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 (Full Commission): The Commission may consider the following options in deciding how to proceed with the review process:

Process for Review: The Commission should establish a process for reviewing any requests submitted by parties to review the Assigned Commissioner's Determination. Options the Commissioner may consider include:

- 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 5 calendar days following the issuance of the Assigned Commissioner's determination.
 - Any 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 in a fair and efficient manner.
- c. To prevent unnecessary delay and to avoid wasting resources on minor procedural matters, the Commission may review any disputed preliminary matters when the full Commission takes up the case at the Hearing on the Merits (but prior to the commencement of the Hearing on the Merits itself).

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.

The Hearing Brief is subject to the following rules regarding format and submissions under Enforcement Regulation 8(E):

- Only the Executive Director is required to submit a Hearing Brief. Respondents may also submit Hearing Briefs. The same page limitations that apply to Probable Cause Reports also apply to Hearing Briefs (25 pages, exclusive of attachments, for Hearing Briefs and 10 pages, exclusive of attachments, for the Rebuttal 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 brief is due no later than 15 calendar days, and Staff's rebuttal 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 unless the Assigned Commissioner agrees to accept briefs by email.

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 the submission of motions 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 5 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 arguments, 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.

Certain rules and decisions governing the process for a Hearing are considered procedural matters, as outlined in section II above, and must be resolved during the preliminary matters phase. These items are identified as such and discussed in greater detail below.

A. Hearing – Who Decides

The Enforcement Regulations give the Commission the option to appoint an individual Hearing Officer for each Hearing. If the Commission does not take action to appoint a Hearing Officer, it will automatically preside over the Hearing as a whole body.

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: To preside over the Hearing on the Merits, the Commission may choose any of the following options:

- a. The Commission as a whole serves as the Hearing panel (**Recommended**);
- b. Appoint an individual Commissioner as Hearing Officer
- c. Appoint any licensed attorney as Hearing Officer

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

Hearings are subject to the following rules regarding the public:

- All Hearings must be open to the public. Enforcement 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. Enforcement 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.” Enforcement Reg 9(A)(2).

The Enforcement Regulations are silent regarding witness exclusion at the public hearing. The following issues are procedural matters that should be resolved during the preliminary matters stage.

Witness Exclusion: The Assigned Commissioner should set the standard that is applied to 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

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. Enforcement Reg 9(A)(5).
- The requesting party must deliver a copy of the request to all parties. Enforcement 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.”

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.”

CA 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. CA APA Section 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. Enforcement Reg 9(A)(4).
 - Formal evidence rules do not apply in Commission Hearings. A simpler set of evidence rules apply. Enforcement Reg 9(A)(4); CA APA Section 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. CA APA Section 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. CA APA Section 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. CA APA Section 11513(f).
- Commission Staff and each respondent may call and examine witnesses, introduce exhibits, cross-examine and impeach witnesses, and rebut any evidence presented. Enforcement Reg 9(A)(4). CA APA Section 11513(b).
- Oral evidence shall be taken only on oath or affirmation. CA APA Section 11513(a).

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

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. Enforcement 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. Enforcement 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. Enforcement 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. Enforcement Reg 9(A)(10)(ii).
 - The party must provide a copy to all other parties. Enforcement Reg 9(A)(10)(ii).
 - The request must be delivered at least ten business days before the Hearing date. Enforcement 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. Enforcement Reg 9(A)(10)(iii).

C. Presentation of a 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 Commission (or Hearing Officer).

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. Enforcement 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. Enforcement Reg 9(A)(8).

The Enforcement Regulations are silent on some issues relating to oral argument. The following issues are procedural matters that should be resolved during the preliminary matters stage.

Oral Argument: The Assigned Commissioner should establish the order each party will follow for opening and closing statements. Options include:

- Enforcement Division, as the prosecuting party, should go first for both **(Recommended)**;
- 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 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. Enforcement Reg 9(A)(6).
- Each party must move to admit any exhibit during the presentation of their case in chief. Enforcement 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. Enforcement 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. Enforcement 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. CA APA Section 11513(c).

The Enforcement Regulations are silent on some issues relating to exhibits. The following issues are procedural matters that should be resolved during the preliminary matters stage.

Exhibits: The Assigned Commissioner should decide whether parties must authenticate each exhibit through a party with direct knowledge of the contents of the exhibit. Options include:

- The parties are required to authenticate the exhibits through witness testimony **(Recommended)**;
- Exhibits can be introduced without witness authentication, but the parties must explain the nature and origin of the exhibit.

Stipulated Exhibits: The Assigned Commissioner should establish rules for the following:

3. 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.
4. Formatting requirements for the notice of stipulated exhibits.
 - a. Establishing a template for the notice **(Recommended)**
5. Delivery requirements for the notice of stipulated exhibits. Options include:
 - a. Who gets the Notice
 - i. Notice sent to every Commissioner **(Recommended)**;
 - ii. Notice sent only to the Chair;
 - iii. Notice sent only to the hearing officer;
 - b. How does the Notice get sent:
 - i. Notice sent via email **(Recommended)**.
 - ii. Notice sent via mail;

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.”

(CA APA Section 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. Enforcement Reg 9(A)(6).
- Witnesses shall then be examined by the opposing party via cross-examination. Enforcement 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. Enforcement Reg 9(A)(6).
- After examination by all parties, the Commissioners shall have an opportunity to ask questions to the witness. Enforcement Reg 9(A)(6).
- Each witness must testify under oath. CA APA Section 11513(a).
 - The Commission, Commissioners, and Hearing Officers have the authority to administer oaths and affirmations. Enforcement Reg (9)(A)(9).

The Enforcement Regulations are silent on some issues relating to witnesses. The following issues are procedural matters that should be resolved during the preliminary matters stage.

Witness Examinations: The following issues should be resolved by the Assigned Commissioner 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. 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.
3. Remote Video Testimony. Options include:
 - a. The Commission will allow remote video testimony from all witnesses **(Recommended)**;
 - b. The Commission will not allow remote video testimony;
 - c. The Commission will allow remote video testimony only from witnesses that can demonstrate inability to be present.

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.

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. Enforcement 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. Enforcement 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. Enforcement Reg 9(B)(3).
- If a Hearing Officer presided, that officer must submit a report and recommendation within 30 calendar days of the hearing. Enforcement Reg 9(B)(1).
 - The Hearing Officer's report must include proposed findings of fact and conclusions of law. Enforcement Reg 8(A)(2).
 - The Hearing Officer's report must be delivered to the Commission, the Executive Director, and each respondent. Enforcement 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. Enforcement 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. Enforcement 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. Enforcement Reg 9(E).
 - A complainant may appeal a final order through the procedures in the California Code of Civil Procedure. Enforcement 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. Enforcement Reg 9(F).
 - A party may appeal a default order. Enforcement Reg 9(F).

The Enforcement Regulations are silent on certain issues relating to findings. The following issues are procedural matters that should be resolved during the preliminary matters stage.

Default Orders: The Assigned Commissioner should establish the following:

1. When the Commission will determine whether to issue a default order. Options include:
 - a. 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**);
 - b. The Commission immediately votes on whether to issue a default order; or
 - 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**); or
 - A full Commission vote with three votes required for a determination (**Recommended**); or
 - b. Other procedures, to be determined by the Commission.

Orders and Penalties – Timing: The Assigned Commission should determine when the Commission will vote on orders and penalties. Options include:

- At the same meeting during which the Commission votes on whether to find a violation (**Recommended**);
- 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. Enforcement 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. Enforcement 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. Enforcement Reg 9(D).